No. 88-1469

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

October Term, 1988

DAVID AVALOS and SUSHI, INC., Petitioners

v.

GORDON THOMPSON, JR., PAUL HAMILTON and PHILIP WAGGONER, Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Is the Chief Judge of a United States District Court entitled to qualified immunity from damages when, in the absence of a case or controversy, the judge summarily and without notice or hearing orders revocation of a properly issued permit for display of sculpture with a distinctly political message on federal property?

2. Is the Chief Judge of a federal court entitled to absolute immunity from declaratory and injunctive relief not affecting exercise of his Article III judicial powers over cases or controversies, solely on account of occupying an office equivalent in rank with the federal judge asked to grant the relief?

3. Does a United States Court of Appeals have discretion to refuse to hear and decide an appeal which is not jurisdictionally or practically defective by reason of procedural impropriety, mootness, abandonment, or any equivalent limitation?

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SUPREME COURT OF THE UNITED STATES

October Term, 1988

DAVID AVALOS and SUSHI, INC., Petitioners

v.

GORDON THOMPSON, JR., PAUL HAMILTON and PHILIP WAGGONER, Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners David Avalos and Sushi, Incorporated respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.[1]

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1 No parties not listed in the caption of this petition were named or appeared in the case below except for the United States General Services Administration.

OPINIONS BELOW

The judgment (order dismissing appeal) of the Court of Appeals was not published; it is reprinted in the Appendix hereto at page A-1. The order of the Court of Appeals denying a petition for rehearing and suggestion for rehearing en banc was not published; it is reprinted in the Appendix hereto at page A-2.

The memorandum opinion of the United States District Court for the Southern District of California from which the appeal was taken was not published; it is reprinted in the Appendix hereto as pages A-3 through A-29.

JURISDICTION

The judgment (order dismissing appeal) of the Court of Appeals was entered August 12, 1988 and the order denying the timely petition for rehearing and suggestion for rehearing en banc was entered December 7, 1988; this petition for writ of certiorari is timely pursuant to 28 U. S. C. 2101(c) and Rule 20.4, Rules of the Supreme Court of the United States.

Certiorari jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article III, section 2: "The judicial Power shall extend to all Cases, in Law and Equity . . . "

United States Constitution, First Amendment: "Congress shall make no law . . . abridging the freedom of speech . . ."

United States Constitution, Fifth Amendment: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . "

STATEMENT OF THE CASE

The District Court granted summary judgment in favor of defendants in a *Bivens* action[2] on the grounds of immunity. The Court of Appeal dismissed an appeal of the judgment in a decision which provided in its entirety:

"The appeal is dismissed without prejudice."

District Court jurisdiction was grounded on 28 U. S. C. 1331 and the Court of Appeals' jurisdiction was based on 28 U. S. C. 1291.

Petitioners David Avalos and Sushi, Inc. are a widely respected artist and art gallery. In late 1985 Sushi conceived an art show featuring art outside the

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2 *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1970).

gallery in public places. As part of that show, petitioners wished to display in the plaza of the downtown San Diego, California federal building, an artwork entitled the *San Diego Donkey Cart* consisting of a full-scale, painted wood construction by Avalos modeled after the tourist-attraction donkey carts common in the streets of Tijuana, B. C., Mexico near San Diego.

Petitioners made inquires and were advised they would need to secure a permit from the General Services Administration (G. S. A.) to display the sculpture. They contacted the local G. S. A. and submitted an application for a permit to place the art work for two weeks (January 4 - 17, 1986) at a location some 84 feet east of the doorway of the courthouse wing of the federal building and some 34 feet west of the public sidewalk where it would not interfere with ingress or egress. The permit was granted.

On Sunday, January 5, 1986, Avalos installed *San Diego Donkey Cart* at the designated location. The next day, Chief Judge Gordon Thompson, Jr. of the United States District Court for the Southern District of California issued a written order on United States District Court memorandum stationery addressed to Paul Hamilton, the local G. S. A. buildings manager, ordering:

> "For security reasons you are hereby directed forthwith to cause the removal of the structure standing in front of the United States Courthouse."

The order was signed: "Gordon Thompson, Jr., Chief Judge, United States District Court." Hamilton believed this was an order of the Court; in fact, the directive had been communicated orally at first and he requested that it be put in the form of a written court order. Considering himself compelled by judicial power of the United States, Hamilton removed the art work and revoked the permit.

Four days later on January 10, 1986, petitioners filed a complaint against Judge Thompson, G. S. A. officials and the G. S. A. seeking injunctive and declaratory relief and damages and requesting immediate relief by temporary restraining order. Judges in the Southern District of California deemed themselves disqualified and refused to consider the temporary restraining order application. The application was never heard and therefore the original permit period passed without the art work being displayed.[3]

The case proceeded before Judge Harry L. Hupp of the Central District of California as a Southern District case. The defendants moved for dismissal or summary judgment. The District Court granted summary judgment in favor of the individuals on the ground they were entitled to immunity, certifying the decision as final and appealable under Rule 54(b) of the Federal Rules of Civil Procedure. The case against the G. S. A.

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3 Petitioners sought an order from the Court of appeals for the Ninth Circuit directing the Southern District to hear the temporary restraining order application but that application was denied on January 15, 1986. (Ninth Circuit case number 86-7016.)

under the Administrative Procedure Act was allowed to proceed.[4]

Petitioners timely appealed the summary judgment and the appeal was fully briefed. During the oral argument, the Court of Appeals inquired about the status of the case against the G. S. A. The panel then conferred in chambers and returned to the bench to announce that argument would be stayed until the District Court reached a final decision in the case against the G. S. A.

After a decision in the case against the G. S. A. was rendered, instead of rescheduling argument and proceeding to decide the appeal, the Ninth Circuit panel issued an order which read in its entirety:

"The appeal is dismissed without prejudice." A-1.

Petitioners timely filed a petition for rehearing and suggestion for rehearing en banc noting two points: (1) the dismissal operated as a final disposition of the issues in the case, notwithstanding the proviso "without prejudice," and (2) neither the doctrine of mootness nor any other of the traditional exceptions to the rule requiring a decision on the merits was present.

The petition for rehearing was denied and the suggestion for rehearing en banc was rejected.

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4 Ultimately the District Court reviewed the G. S. A. proceedings and set aside the G. S. A.'s revocation of the permit. That decision was not involved in the Ninth Circuit appeal nor is it involved in this certiorari petition.

REASONS FOR GRANTING THE WRIT

Is the Chief Judge of a United States District Court entitled to qualified immunity from damages when, in the absence of a case or controversy, the judge summarily and without notice or hearing orders revocation of a properly issued permit for display of sculpture with a distinctly political message on federal property?

If it is assumed the law of immunity of judges does not vary according to whether the judge in question is a state judge or a federal judge, the law to apply in this case would be so well settled that the case would not be deserving of this Court's attention, even though the case was obviously wrongly decided under that law.

However, this petition should be granted since the pertinent cases on point have all involved state judges while this case involves a federal judge. The refusal of the Court of Appeals even to decide this case, combined with the obvious error of the decision of the District Court, reveals the existence of a de facto gloss on the doctrine of judicial immunity, a gloss which holds that the immunity of a federal judge is much broader than that of a state judge. It appears to be so broad as to extend beyond absolute immunity from liability even for actions not taken in a judicial capacity, to encompass immunity even from the formalities of judicial review.

The result is an intolerable diminution of the rights of citizens who have the misfortune not only of

suffering constitutional injuries, but of suffering those injuries at the hands of a United States judge whose conduct is exempt from remedy or even review in the federal courts.

Surely this is not a phenomenon that does or will occur frequently. But just as surely it is one which will occur predictably and occasionally until the end of the Republic. Each time it occurs, the axiom central to the American way of life, that no man is above the law, is sorely tested.

In sum, it is crucially important for this Court, now presented with a case testing the axiom directly and precisely, to decide whether the status of United States Judge insulates an individual from damages for harms he inflicts well outside the scope of any case or controversy.

The District Court correctly decided that Chief Judge Thompson's action should be analyzed under the doctrine of qualified not absolute immunity since his actions were taken in an administrative capacity, not as a judge adjudicating a case or controversy. A-10 through A-14; *see Forrester v. White*, 484 U.S. -- (1988). Under the qualified immunity doctrine, government officials escape liability for damages when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). But the District Court failed to evaluate with any care whether the law Chief Judge Thompson violated was "clearly established" and the Court of Appeals refused to examine Chief Judge Thompson's conduct at all.

In several respects, the law Chief Judge Thompson violated was "clearly established" and a reasonable judge should have known as much.

Nothing could be more "clearly established" than that a person may not be deprived of liberty or property without due process of law and these requirements of due process take on heightened importance when core First Amendment free speech rights are at stake. Clearly established, basic procedural formalities were not observed in this case.

Clearly the permit issued to Avalos and Sushi was a property right. Congress established a public forum by creating a method for allowing use of federal property for the display of art. Petitioners fulfilled all the conditions precedent for entitlement to use the public forum subject to revocation only "for cause." Cf. 41 C. F. R. 101-20.703 (cause related grounds for revocation of Public Buildings Cooperative Use Act permit).

Petitioners' property right to use the public forum was revoked without the rudiments of due process, notice and an opportunity to be heard.

There is nothing about notice to petitioners in Chief Judge Thompson's order of January 6, 1986. Parallel to the absence of notice is the plain implication there was never any thought of a hearing, even though "some form of a hearing is required before the owner is finally deprived of a protected property interest." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982).

This Court's cases reveal that under the Fifth Amendment the issue is not *whether* there should be a hearing but *when* it should be -- before the property interest is taken or afterward. See, e. g. *United States v. Eight Thousand Eight Hundred Fifty Dollars*, 461 U.S. 555 (1983); *Logan v. Zimmerman Brush Co.*, *supra*, 455 U.S. 422; *Hodel v. Virginia Surface Min. and Recl. Assn.*, 452 U.S. 264 (1981); *Parratt v. Taylor*, 451 U.S. 527 (1981); *Matthews v. Eldridge*, 424 U.S. 319 (1976); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

The District Court's opinion which the Court of Appeals refused to review did not address petitioners' due process rights at all. Instead, the District Court took the view, see A-20, that nothing Chief Judge Thompson did implicated petitioners' rights; rather, Chief Judge Thompson only ordered lesser officials to affect petitioner's rights and it was only the lesser officials whose actions reached the threshold of the Fifth Amendment.

This argument is at best facetious. It is clearly established, as logic would dictate, that a person is potentially liable for a constitutional tort so long as he or she is *causally linked* to the harm; a showing that the defendant personally inflicted the harm is not required. See, e. g., *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690-691 (1978); *Rizzo v. Goode*, 432 U.S. 362, 373-375 (1976). If the District Court's view were the rule, individual constitutional rights would soon be of little value.

Further, the First Amendment interests at stake demanded heightened and stricter due process requirements than normal. The law of First Amendment due process is clearly established in a legion of well-known cases involving prior restraints of speech.

The art work Chief Judge Thompson ordered not to be exhibited was a sculpture with a distinctly political message. The tourist attractions it parodied involve the seating of American tourists on the bench of a donkey cart that is gaily painted in a Mexican fashion. The tourists don large sombreros bearing lighthearted inscriptions (e. g., "Drunk Again!"), and pose for photographs that are presumably used like postcards or as mementoes of the tourist's visit to the border city of Tijuana.

Avalos' work was a full-size cart that featured, where the observer would expect to see the tourists, a plywood cutout of two figures -- a simply-dressed Mexican peasant with his arms upraised and, behind him, a U.S. Border Patrol officer frisking the captive peasant. There is another figure in the scene, a homeless person sleeping in a doorway. The artist's intent was to express the irony of the gay facade which contrasts against the gritty realities of the culture of the U.S.-Mexican border today.

The District Court in its opinion only dealt in passing with the First Amendment issues, noting *United States v. Grace*, 461 U.S. 171 (1983), a case which fully supports petitioners here. The District Court attempted to distinguish *Grace* by treating this case as though the art work had been installed *in* a courthouse,

not well outside at a location which surely could not be denied the status of public forum.

The District Court failed entirely to discuss the large body of law on prior restraints, even though Chief Judge Thompson's action ordering removal of the art work was a classic prior restraint of expression. The procedural requirements for imposition of a prior restraint by denial of a license and by court order are as clearly established as any doctrine this Court has ever pronounced. E. g. *Fort Wayne Books, Inc. v. Indiana*, -- U.S. -- (Nos. 87-470 and 87-614) (Feb. 21, 1989); *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 374 (1971); *Carroll v. Princess Anne*, 393 U.S. 175, 180 (1968); *Freedman v. Maryland*, 380 U.S. 51, 58-59 1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Near v. Minnesota*, 283 U.S. 697 (1931).

Finally, in finding Chief Judge Thompson immune the District court overlooked "clearly established" statute and regulatory law which the Chief Judge violated.

A clearly established Act of Congress, signed into law by the President, 40 U. S. C. 285, provides:

> "All courthouses . . . together with the site or sites thereof, are hereby expressly declared to be under the exclusive jurisdiction

> and control and in the custody of the Administrator of General Services . . . "

The other two branches of government have troubled themselves to include the word "exclusive" in a statute that would imply the same thing without that word--to make it unmistakably clear it is G. S. A., and no one or no other agency, that has "jurisdiction and control and . . . custody" of courthouse sites.[5]

The district court reasoned that this law cannot deny United States Judges some "say," or "interest," (A-20) in courthouse security. But there is no issue in this case of the judges' interest or say in security matters. Judges should have some important say about security issues at the courthouse. But this case is not about a Chief Judge's "say"; it is about his assertion of authority unilaterally and without notice or hearing to revoke a duly issued permit, in the absence of a case or controversy, on nothing more than speculation that public safety near the courthouse might at some future time be affected in some remote way.

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5 This instant case does not involve the inside of a court*room*, or the area immediately outside it, where the coverage of section 285 might be considered deeply problematic. This case involves a "site" outside of, indeed some 84 feet removed from, the court*house* building. Additionally, note that for the limited purposes of the inquiry regarding immunity -- a search only for what the clearly established law is -- it cannot be maintained section 285 is not clear or established. It could be argued to be wrong, but that would make it no less clear.

Additionally, Chief Judge Thompson utterly ignored a statutory and regulatory scheme set forth in the U.S. Code and the Code of Federal Regulations, the clearly established law of the Public Buildings Cooperative Use Act which was surely violated by Chief Judge Thompson's order.

The Act itself provides that the G. S. A., an Executive Branch agency, and not any Judicial Branch person or entity, is empowered to administer the Act and to issue permits under it. See generally, 40 U. S. C. 490 (a). Consistently, the regulations under the Act provide that the G. S. A. buildings manager is empowered to approve, disapprove, or cancel permits. 41 C. F. R. secs. 101-20.701 (c); 101-20.702 (a), (e), (f); 101-20.703.

Moreover, the regulations provide for cancellation of permits on one or more of ten specific grounds, *id.*, sec. 101-20.703 (a) (1) through (a) (10), none of which even arguably include the kinds of threats that might be encompassed in the "security reasons" that were the sole rationale stated by Chief Judge Thompson.

In sum, Chief Judge Thompson stepped in and cancelled the permit even though sole power to do so was vested in another official, and even though the law setting forth grounds for such cancellations did not include the ground on which he relied. It could not be more clearly established that in doing so he violated the law.

To summarize, Chief Judge Thompson was held immune even though he violated clearly established law in three different ways. He revoked petitioners'

property right in the use of a public forum, without a semblance of a hearing, in violation of the Fifth Amendment due process clause. He imposed a prior restraint on protected, political speech, without a hearing or any of the other procedural formalities required by the First Amendment. And he took this action in the face of a statutory and regulatory scheme vesting exclusive jurisdiction to do so in another government official employed by another branch of the government.

Petitioners' case is made compelling by the fact the respondent is the Chief Judge of a United States District Court. This case clearly presents the question whether a Chief Judge, by virtue of his office, is situated above the law.

Is the Chief Judge of a federal court entitled to absolute immunity from declaratory and injunctive relief not affecting exercise of his Article III judicial powers over cases or controversies, solely on account of occupying an office equivalent in rank with the federal judge asked to grant the relief?

The clearest illustration that the courts below created in this case a de facto rule rendering the law of immunity as it applies to United States judges much more expansive than the law of immunity as it has been declared by this Court with regard to state judges is the finding by the District Court, upheld by the Court of Appeals, that Chief Judge Thompson is immune from injunctive and declaratory relief.

With regard to state judges this court held directly to the contrary not long ago. *Pulliam v. Allen*, 466 U.S. 522, 541-542 (1984); see also *id.*, at 544 (Powell, J., dissenting, noting the holding extends to declaratory relief). And in this case the District Court acknowledged the existence of this rule. A-10.

Yet the District Court proceeded to decide Chief Judge Thompson *is* immune from declaratory and injunctive relief. The District Court held it lacked power to issue an injunction against Chief Judge Thompson, A-21 through A-22, and without mentioning petitioners' separate claim for declaratory relief, held no remedy at all was available.

The District Court expressed the thought that "[petitioners have] cited the court no authority," A-21, and "[t]his Court knows of no authority," to the contrary. A-22. These statements and the court's grant of summary judgment reveal that the District Court concluded not only that *Pulliam v. Allen* applies only to state judges, but also that when it comes to United States judges the converse rule operates: United States judges are presumptively immune from injunctive and declaratory relief.

It appears the District Court believed it could not exercise its Article III judicial powers to control the exercise by another United States judge of his own Article III judicial powers. A-22. Yet the key fact in this case is that Chief Judge Thompson's action was *not* an exercise of Article III judicial powers. The District Court had acknowledged this earlier in its opinion. A-11 through A-14.

Article III of the Constitution delineates the *nature* of the judicial power by only that vague term: "judicial power." With one minor exception the only clear limitations expressed in the Constitution have to do with the *circumstances* in which that vague power is exercised: "cases, in law and equity"; "cases"; "cases"; "controversies"; "controversies"; "cases"; "cases"; "trial"; "cases"; "trial"; "trial"; "open court." (The exception is in the second paragraph of Section 3, implying that judicial power includes the power of "conviction.")

It cannot be contended any of these *circumstances* even arguably existed in the case of petitioners' art work and permit as of the time Chief Judge Thompson intervened. There was no "case" or "controversy" or "trial" or "open court." See generally *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968).

Moreover, there was no alternative forum for petitioners. Despite a suggestion to the contrary by the District Court, A-22, neither this Court nor the Circuit Court of Appeals would have had jurisdiction over the dispute. U.S. Constitution, Article III, section 2, paragraph 2; 28 U.S. Code sections 1291, 1292; *Frazier v. Heebe*, 482 U.S. -- (1987); *In re Rini*, 782 F.2d 603 (6th Cir. 1986); *Exhibitors Poster Exchange v. National Screen Service Corp.*, 543 F.2d 1106 (5th Cir. 1976), cert. den. 431 U.S. 938; *Wooten v. Bomar*, 266 F.2d 27, 28 (6th Cir. 1959), cert. den. 361 U.S. 888.

If no remedy could be afforded by the District Court in this case, then Chief Judge Thompson was

absolutely immune to a degree not heretofore contemplated for any official.

Petitioners contend the rule must be that when a United States Judge exercises administrative powers outside the confines of a case or controversy, in those limited circumstances he or she *is* subject or subordinate to the remedial Article III powers of another United States Judge exercised in a case filed by a subject of the first judge's actions.

In fact, petitioners contend, such a rule is constitutionally mandated. Otherwise there would be no way for parties in petitioners' position to get the protection guaranteed in Article III, section 2, paragraph 1: "The judicial power shall extend to *all* cases . . . arising under this Constitution [or] the laws of the United States . . .."

The alternative, necessarily, would be intolerable -- a holding that although petitioners were wronged, the courts are powerless to grant them relief. Cf. *Bell v. Hood*, 327 U.S. 678, 684 (1946).

In addition, the reservations the District Court expressed about injunctive relief, whether right or wrong, simply would not apply to declaratory relief. It is only a passive declaration, not an affirmative order. Yet the courts below have held, without any discussion of the issue, that petitioners must be denied declaratory relief as well.

To repeat a point made above, petitioners freely acknowledge that this is a kind of dispute that does not and will not arise very often. But it will arise,

predictably. Only this Court can finally decide what rules shall apply to the resolution of such disputes. That decision will be of profound Constitutional significance.

For this reason, the petition should be granted and the important question of the amenability of United States Judges to injunctive and declaratory relief decided.

Does a United States Court of Appeals have discretion to refuse to hear and decide an appeal which is not jurisdictionally or practically defective by reason of procedural impropriety, mootness, abandonment, or any equivalent limitation?

As it stood before the Court of Appeals this case suffered from no procedural infirmity. It was not moot, abated, or otherwise unentitled to adjudication. Yet the Court of Appeals elected not to decide the case, an election which had the effect of affirming the judgment against petitioners without any statement of reasons or analysis of law -- indeed, without formally even deciding the case.[6]

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6 No reason was given for the Court of Appeals' decision to dismiss the case "without prejudice." Insofar as relief against Chief Judge Thompson is concerned, the "without prejudice" proviso is mysterious. The decision appealed from was a final, conclusive resolution of the parties' rights, and accordingly, dismissal of the appeal had final and conclusive effect.

Thus, the case presents this Court with a rare opportunity to decide the fundamental and vitally important question of whether a United States Court of Appeals has the discretion to refuse to decide an appeal that is legally entitled to adjudication, as well as the related question of the degree to which it must, in deciding a case, provide a statement of reasons and analysis of legal issues presented.

It appears these questions have not been very fully explored to date. See, e.g., *Colorado River Water Conservation District v. United States*, 424 U.S. 812, 817-818 (1976); *Taylor v. McKeithen*, 407 U.S. 191 (1972); *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); Commission on Revision of the Federal Court Appellate System, Structure, and Internal Procedures: Recommendations for Change (Final Report) (1975), p. 50 (cited at 9 Moore's Federal Practice, section 236.02, p. 36-3 (fn. 3)).

Certiorari should be granted to determine whether a Court of Appeals has discretion to refuse to decide cases properly before it.

CONCLUSION

For the foregoing reasons, petitioners submit this case is one well worth this Court's consideration. Petitioners pray the Court grant the writ of certiorari.

Respectfully submitted,

GREGORY MARSHALL

THOMAS F. HOMANN

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March, 1989

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 87-5939

David Avalos and Sushi, Inc.,
Plaintiffs,

v.

General Services Administration,
Hon. Gordon R. Thompson, Jr.,
Paul Hamilton, and Philip Waggoner,
Defendants.

ORDER
Filed August 12, 1988

Before: FARRIS, NORRIS, and REINHARDT, Circuit Judges

The appeal is dismissed without prejudice.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 87-5939

David Avalos and Sushi, Inc.,
Plaintiffs,

v.

General Services Administration, et al.,
Defendants.

ORDER
Filed December 7, 1988

Before: FARRIS, NORRIS, and REINHARDT, Circuit Judges

The panel, as constituted above, has unanimously voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
Case No. CV 86 - 0043 (HLH)

David Avalos and Sushi, Inc.,
Plaintiffs,

v.

General Services Administration,
Hon. Gordon R. Thompson, Jr.,
Paul Hamilton, and Philip Waggoner,
Defendants.

MEMORANDUM IN RE MOTIONS FOR
SUMMARY JUDGMENT
Filed April 16, 1987

In this matter, motions to dismiss and motions for summary judgment on behalf of all defendants were previously submitted. The matter will be treated as a motion for summary judgment under Rule 56. The motions for summary judgment are granted at to defendants Hon. Gordon Thompson, Jr., Paul Hamilton, and Philip Waggoner. The motions are denied as to defendant General Services Administration (GSA).

The matter is treated as a motion for summary judgment because certain undisputed facts appear in the affidavits and declarations of the parties. The Court

has taken as true for the purposes of this motion those allegations of the complaint which have not been disputed in the declarations, as well as the undisputed portions of the declarations of the parties.

1. *The facts*. The facts set forth herein below are without substantial controversy. Plaintiff, David Avalos, is an artist who has created artworks, including the one at question in this lawsuit, which contain expressions regarding the situation of alien Mexican laborers in this country. The other plaintiff, Sushi, Inc., whose status in this lawsuit is somewhat vague but not addressed on these motions, sponsored a showing of "street art" in the city of San Diego in January 1986. Congress has enacted authorization for certain use by the public of federal buildings and grounds. (Public Buildings Cooperative Use Act of 1976, P.L. 94-541; hereafter PBCUA.) General Services Administration, whose duties include management of federal buildings, has adopted regulations under PBCUA allowing the "occasional use" of public areas in public buildings and grounds for "cultural, educational, and recreational activities." Pursuant to those regulations, GSA has developed a permit application process. Avalos through an agent applied for a permit to display his work "San Diego Donkey Cart" (hereinafter referred to as "the work" or "the work of art") in an open area on Courthouse grounds immediately outside the front door to the Federal Courthouse in San Diego. The application contained a picture of a model of the proposed work of art. The work purportedly depicted a San Diego version of a "Tijuana donkey cart" (apparently a common tourist attraction in Tijuana, consisting of a small cart pulled by a donkey in which the tourists may ride.) Avalos' work depicted a Latino

on the donkey cart being frisked by a man in the uniform of a Border Patrol agent. For purposes of the motion for summary judgment, it is uncontradicted that when Avalos' agent applied for the permit, the clerical employee of the GSA receiving the permit inquired as to what precautions there were to prevent children and others climbing over the display. Avalos' agent states that the clerical employee suggested a fence or some other device to protect the display. When this matter was reported to Avalos, he agreed that such would be appropriate, expressing the thought that such a fence was in consonance with the artistic message intended to be conveyed. Accordingly, when erected, the representation of the "San Diego donkey cart" was surrounded by a stout fence consisting of wooden posts, chain link, and barbed wire, securely enclosing the work. The application, however, was never amended to show the existence of the fence, its appearance, or its construction. The permit was duly issued by GSA for the period January 4, 1986, to January 17, 1986. Avalos' work of art was installed on January 5, 1986. The next morning, January 6, 1986, the defendant, Gordon Thompson, Jr., a judge of the United States District Court for the Southern District of California, and Chief Judge of that district, was approached by a building guard. The record does not reveal whether the guard was an employee of the Federal Protective Service (the security arm of the GSA) or of the United States Marshal (the security arm of the Federal District Court). The building guard advised Chief Judge Thompson that in the opinion of the security staff the artwork constituted a security hazard. The building guard reported that the structure could not be routinely inspected and that the wire and wood fence prevented the guard from making close inspections for any

explosive device or other dangerous material. During the noon hour, Chief Judge Thompson conferred with the other judges of the court. The judges agreed that the structure constituted a security threat. At approximately 3 p.m. on January 6, Chief Judge Thompson informed defendant Paul Hamilton, GSA's manager of the courthouse building, of the position of the court and specifically requested that the sculpture be removed because of the perceived security threat. Mr. Hamilton requested that Chief Judge Thompson confirm this position in writing. Chief Judge Thompson then wrote a memo to Mr. Hamilton the text of which stated as follows:

> "For security reasons you are hereby directed forthwith to cause the removal of the structure standing in front of the United States Courthouse."

The memorandum was signed by Chief Judge Thompson. Mr. Hamilton orally advised Mr. Avalos that Chief Judge Thompson had directed removal of the artwork.

Following Mr. Hamilton's phone call to Mr. Avalos on January 6, a letter was delivered to Mr. Avalos dated that same day which reads in part:

> "The permit for use of space in public buildings and grounds issued to you on December 10, 1985, is hereby revoked. Please have the piece removed not later than 8 p.m. this date.
>
> This action is taken based on the provisions of Federal Property Management Regulations,

Title 41, Code of Federal Regulations, Chapter 101, paragraph 101-20.7 and considerations for the security of the building and its occupants."

Mr. Avalos did not remove the artwork. Thereafter, employees of GSA removed the artwork and stored it until picked up by Mr. Avalos.

Mr. Avalos consulted the American Civil Liberties Union, whose attorney represents Mr. Avalos in this lawsuit. This lawsuit was initially filed on January 10, 1986. A First Amended Complaint was filed on March 3, 1986. (The First Amended Complaint contains allegations of facts occurring after January 10, and to that extent should have been denominated a "First Amended and Supplemental Complaint." The Court so considers it.) In the meantime, Mr. Avalos pursued administrative remedies under the GSA regulations. The regulations (41 C.F.R. 101-20.7, et. seq., of the Federal Property Management Regulations) provide the grounds for disapproval of or cancellation of a permit. Section 101-20.704, provides for a type of "appeal" from a cancellation of a permit. The appeal allowed is not a full due process type administrative hearing, but instead consists of an application for review to the GSA "regional officer" (the immediate supervisor of the building manager), who shall conduct an informal review, including hearing from both the building manager and from the appellant and shall render a decision. A decision is to be rendered within ten days of the time the appeal is received by the regional officer. The regional officer reviewing Mr. Avalos' appeals was defendant Philip Waggoner, whose official

title is "Director of Buildings Management Division, Region 9 of the General Services Administration."

The filing of this lawsuit on January 10, 1986, coincided with the filing of the administrative appeal. In his handling of the appeal, Mr. Waggoner consulted with Mr. Hamilton. He also inquired of Mr. Avalos if Mr. Avalos wanted to submit any further material beyond his letter of January 10. Mr. Avalos replied that he wished to submit no further material. On January 23, 1986, Mr. Waggoner denied the appeal. He stated first that the appeal was moot, as the permit expired on January 17, 1986. He also stated as an alternative ground as follows:

> "Secondly, when the permit was issued, your display was understood to be open. However, when erected, unlike photographs supplied with your application, your display was enclosed completely by a fence approximately 8' by 10' and made up of two-by-fours, barbed wires, and chain link fence. Thus, your display varied from your application."

Thereafter, as set forth above, the complaint was amended to include an action for court review under the Administrative Procedure Act.

As to the motivation of the parties, there is a dispute of fact. Chief Judge Thompson, in his declaration, states that he was motivated by security considerations only, and his action was not based on any personal feelings about the artwork or its expressive content. Mr. Avalos recites inadmissible hearsay statements to the contrary. There has been no

discovery on the question of motivation. To the extent that the motivations of the parties are relevant, therefore, this motion for summary judgment could not be granted without an opportunity for discovery. However, as set forth below, motivation is not an element in the Court's determination that summary judgment should properly be granted to the defendants Thompson, Hamilton, and Waggoner.

Plaintiffs' complaint, although expressed on different legal theories, proceeds on the basic contention that the removal of the artwork violated the First Amendment rights of the plaintiffs. Plaintiffs seek both injunction and damages. The plaintiffs assert that damages are sought only as an alternative remedy. The action is posited in the nature of a "*Bivens*" action to redress allegedly unconstitutional actions taken by federal officials. The complaint also alleges that the action taken violated plaintiffs' rights under the "Public Buildings Cooperative Use Act" and its regulations, that there was no legal basis for the cancellation of the permit, and that the regulations, if they allow cancellation on security grounds, are invalid. Thus, plaintiffs proceed under two basic legal theories: 1) A cause of action on a constitutional tort for alleged violation of the plaintiffs' constitutional rights, seeking both injunction and damages, and 2) for an Administrative Procedure Act review of the administrative action taken by GSA. The motions for summary judgment claim both absolute and qualified immunity on behalf of the individual defendants, and as to GSA claims that under the undisputed facts there is no ground for setting aside the administrative decision. These matters will be discussed separately below.

2. *The motions as to Chief Judge Thompson.* For the reasons set forth above, the matter is treated as a motion for summary judgment. This section of this memorandum will discuss the damage action as to Chief Judge Thompson in two aspects: The claim of absolute immunity, and the claim of qualified immunity. Thereafter will be discussed the injunction action as it pertains to Chief Judge Thompson.

a. *The claim of absolute judicial immunity must be rejected.* In his motion, Chief Judge Thompson claims the benefit of the absolute immunity doctrine for judicial acts. The doctrine is expressed in cases such as *Stump vs. Sparkman*, (1978) 435 U.S. 349, 359, 55 L.Ed.2d 331, 341, 98 S.Ct. 1099, 1106, as follows:

> "A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors."

The immunity is founded upon the general proposition that a judicial officer, in performing his duties, should be free to act on his perception of the steps that need to be taken, without fear of personal consequences. (See, e.g., *Bradley vs. Fisher*, (1871) 80 U.S. 335, 347, 20 L.Ed. 646, 649.) The immunity is one to be free of damage claims, and does not extend to injunction claims. *Pulliam vs. Allen*, (1984) 466 U.S. 522, 80 L.Ed.2d 565, 104 S.Ct. 1970.

The *Stump* case makes it clear that actions taken by a judge in a judicial proceeding are clothed with absolute immunity. The judge must be acting in a judicial capacity. (*Dennis vs. Sparks* (1980) 449 U.S.

24, 101 S.Ct. 183, 66 L.Ed.2d 185.) The question here is how this principle applies to an action of an administrative character, not taken in the context of a particular legal proceeding. Care must be taken to distinguish the concept of "judicial action" and "judicial proceeding." For a judicial action taken in a judicial proceeding, the principle of *Stump*, *Dennis*, and other cases clearly applies; there is absolute immunity whether the action taken is wrong, wholly wrong, or egregiously wrong. When the action, however, is judicial, but not taken in judicial proceedings, other considerations arise. The cases are far sparser in this situation. Judges, of course, have certain administrative duties. A Chief Judge in the federal system has numerous administrative duties. The performance of the administrative duties are taken to permit the operation of the court system, so that individual cases may be adjudicated, and in this sense are judicial actions. Not all of such judicial actions, however, receive the protection of the absolute immunity doctrine. An early example is *Ex parte Virginia* (1880) 100 U.S. 339. That case was decided in an era when selection of the jury was not considered necessarily a judicial function. The Supreme Court said:

> "Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge . . . that the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, etc."

Ex parte Virginia, 100 U.S. at 348.

On that holding, a judge was not immune from allegations of discriminatory action in excluding blacks from a jury under the Civil Rights Acts.

This principle has been carried into Ninth Circuit decisions. In *Gregory vs. Thompson* (9th Cir. 1974) 500 F.2d 59, a justice of the peace (not the defendant in this case) was sued for a Civil Rights violation under 42 U.S.C. 1983. The alleged act was the physical eviction of the plaintiff from the judge's courtroom. Absolute immunity was held not to apply. The court said at page 63:

> "When courts have spoken of immunity for acts within the jurisdiction of a judge, they have declared that the doctrine insulates judges from civil liability 'for acts committed within their *judicial* jurisdiction,' or 'for acts within [their] *judicial* role' . . . or for 'their *judicial* acts' . . . thus, judicial immunity does not automatically attach to all categories of conduct in which a judge may properly engage, but only to those acts that are of a judicial nature."
> [Emphasis in the original.]

At page 65 the court said:

> "Judge Thompson's choice to perform an act similar to that normally performed by a sheriff or bailiff should not result in his receiving absolute immunity for this act simply because he was a judge at the time."

In *Richardson vs. Koshiba* (9th Cir. 1982) 693 F.2d 911, the 9th Circuit considered and rejected the claim of absolute immunity for judges sitting on the Judicial Selection Commission of the State of Hawaii. The function of the Commission was to appoint judges, not decide cases. The court says (page 914):

> "Although the Commission describes its responsibilities in 'judicial' terms, these functions bear little resemblance to the characteristic of the judicial process that gave rise to the recognition of absolute immunity for judicial officers: The adjudication of controversies between adversaries. . . . Rather, these responsibilities indicate that the Commission's functions are executive in nature."

Thus, absolute immunity was rejected.

There is some indication in cases outside the Ninth Circuit that absolute judicial immunity may, under some circumstances, be appropriate even though the action taken is not a ruling in a judicial proceeding before the judge. For example, contrast two 7th Circuit cases: *Forrester vs. White* (7th Cir. 1986) 792 F.2d 647 and *McMillan vs. Svetanoff* (7th Cir. 1986) 793 F.2d 149. These two cases, decided within five days of each other, neatly illustrate the balancing act which must be done when looking at judicial action taken outside the context of a ruling in a particular case, where absolute immunity is asserted. In the *Forrester* case, a judge was held absolutely immune against a claim of improper discharge of a probation officer. Five days later, in the

McMillan case, a judge was held not absolutely immune from his action in the claimed improper discharge of a court reporter. Both of these actions, of course, had taken place by the judge in the exercise of administrative functions connected with his judicial office. They were, therefore, "judicial acts." However, in the *Forrester* case, the court held that absolute immunity applied because a probation officer made recommendations to a judge regarding the decision of matters before the judge. *McMillan*, five days later, distinguished Forrester because the court reporter was not directly involved in the decision-making process. Accordingly, absolute immunity was afforded in the one case and not the other.

In this case, Chief Judge Thompson's action was a judicial act. The act was administrative in the sense that it was taken to advance the safe functioning of the federal court. However, it was not an act of the character for which absolute immunity is afforded. It was an action which could have been taken by the Marshal or other security officer entrusted with that function. The Court concludes that Chief Judge Thompson's order is not of the character which is clothed with the absolute immunity afforded to judicial action taken in a judicial proceeding. Accordingly, the doctrine of absolute judicial immunity does not prevent the assertion of a damage claim against Chief Judge Thompson.

b. *Chief Judge Thompson is entitled to immunity from the damage claim by reason of qualified immunity.* The holding that absolute judicial immunity does not apply does not, however, end the discussion of the

immunity problem. On the facts of this case, Chief Judge Thompson is entitled to immunity under the doctrine of "qualified immunity." The doctrine of qualified immunity for government officials taking discretionary action has been in existence for a long time, but until recently hinged upon a factual finding of "good faith." Since "good faith," like any question of subjective state of mind, is an inherently factual issue, until recently, the defense of qualified immunity had to be tested in trial. That situation changed with *Harlow vs. Fitzgerald* (1982) 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727. In the *Harlow* case, the Supreme Court recognized as a deficiency in the practical application of the qualified immunity doctrine that every case had to go to trial. The court though this burden on necessary governmental activity too stringent. The court determined to convert the subjective test to an objective one. At page 818, the court stated:

> "We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. . . . Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether

> that law was clearly established at the time an action occurred."
> 73 L.Ed.2d at 410, 102 S.Ct. at 2738.

And, at page 819:

> "By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and the compensation of victims remains protected by a test that focuses on the objective legal reasonableness of the official's acts."
> 73 L.Ed.2d at 411, 102 S.Ct. at 2738.

It is necessary to apply the *Harlow* standard to the facts in this case which are undisputed. First, it is to be noted, that the potential issue of fact regarding Chief Judge Thompson's motivations is not to be examined on this motion for summary judgment. What must be examined is whether the act taken was within the powers of a Chief Judge and whether there was any established law which clearly states that Chief Judge Thompson could not have taken the action that he took. The Ninth Circuit Court of Appeals in *Capoeman vs. Reed* (9th Cir. 1985) 754 F.2d 1512 has set forth its view as to how the *Harlow* case should be applied. The court said (at page 1514):

> "We conclude that in the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established under the *Harlow* test."

The court then proceeded to examine various cases, mostly in other circuits or in district courts, and concluded that the cases were split on the issue there in question, although the weight of the cases was in plaintiffs' favor. The court went on (at page 1515):

> "Where, as here, there are relatively few cases on point, and none of them are binding, an additional factor that may be considered in ascertaining whether the law is 'clearly established' is a determination of the likelihood that the Supreme Court or this circuit would have reached the same result as courts which had previously considered the issue. To make this determination, we examined the legal analysis employed by those courts, and compare it to the analysis being used at that time by the Ninth Circuit in related but factually different situations. The [trial] court then made such a comparison and concluded that it was not clear at the time in question what standard the Ninth Circuit would have applied. Accordingly, immunity of the qualified variety was held applicable."

In *Backlund, et. al. vs. Barnhart* (9th Cir. 1985) 778 F.2d 1386, 1389, the court stated:

> "*Harlow, Davis* [-- U.S.-- , 82 L.Ed.2d 139 (1984) 104 S.Ct. 3012] and *Mitchell* [-- U.S. -- , 86 L.Ed.2d 411 (1986) 105 S.Ct. 2806] make it clear that, to survive summary judgment, a plaintiff must offer more than general conclusionary allegations that the

> defendant violated his First or Fourteenth Amendment rights. He must show that the defendant violated a particular 'clearly established' right; for example, his right to testify before Congress without reprisal (*Harlow*), to a hearing before being fired from the Highway Patrol (*Davis*), to freedom from warrantless wiretaps (*Mitchell*). In other words, the plaintiff must show that the *particular facts* of his case support a claim of clearly established right."

Turning to this case, plaintiff alleges in general terms that the removal of the work on security grounds violated his First Amendment rights to free speech. The issue is not that simple. It is first patently obvious that the exercise of the right of free speech in or about a courthouse is limited by the necessary use of the building as a courthouse. (See *United States vs. Grace* (1983) 461 U.S. 171, 75 L.Ed.2d 736, 103 S.Ct. 1702, interpreting 40 U.S.C. 13(k), which makes it unlawful to display political items in the Supreme Court building, held constitutional as to the building and grounds but not as to the sidewalk in front of the building.) Courthouses are not public forums (although the sidewalk in front of them may be.) The rights of free speech in a courthouse, therefore, must be considered in relativity to the needs of the functioning of the court within the courthouse and the security of that court.

Plaintiff asserts that the Chief Judge of a federal court has no business making any decisions regarding courthouse security. He cites 40 U.S.C. 285 which states in part as follows:

> "All court-houses . . . together with the site or sites thereof, are expressly declared to be under the exclusive jurisdiction and control and in custody of the Administrator of General Services . . .."

If, by citing this, plaintiff means, as he apparently does, that the federal judges, acting through their Chief Judge, have no legitimate say in courthouse security matters, this Court flatly rejects such a suggestion. GSA may have the responsibility for the protection of the courthouse as a building, but the court, usually acting through the Marshal, has a co-existent security interest in the safe functioning of the courts within that courthouse. Thus, as was said in *United States vs. Poludniak* (8th Cir. 1981) 657 F.2d 948, at 954, courthouse security is among the responsibilities of the Chief Judge. Courthouse security is provided both by the Federal Protective Service, an agency of the GSA, and by the United States Marshal, under the direction of the judges. Their functions clearly overlap. The court has, for all of its history, relied upon the Marshal, federal officers under the direction of the court, for the security not only of the judge's person and of the courtroom in which the trial is being held, but also of the courthouse in which judges must of necessity operate. Plaintiff's proposition that Chief Judge Thompson, or the judges of the Southern District, have no legitimate interest in the courthouse security is emphatically rejected.

The judges of the Southern District have adopted Local Rule 122 which reads as follows:

> "The court, or any judge, may from time to time make such orders or impose such requirements as may be reasonably necessary to assure the security of the court and of all persons in attendance."

So far as this Court is aware (the parties have cited none), there are no cases which detail precisely the functions of the Chief Judge of a federal court, or the judges of a federal court acting through the Chief Judge, in dealing with courthouse security. The Court is convinced that the judges, or the Chief Judge acting for the judges, have, as a necessary consequence of their obligation to efficiently process the administration of justice, the duty and obligation to assure that proper security measures are taken. But whether this view is right or wrong, there is no clearly established law (in qualified immunity terms) which denies it.

Turning now to the facts of this case, plaintiff complains that Chief Judge Thompson, in effect, directed the cancellation of plaintiff's permit. But Chief Judge Thompson did no such thing; he only directed removal of the perceived security hazard; GSA canceled the permit. Chief Judge Thompson acted within the confines of his interests, which was the security of the courthouse, and which does not have any particular direct relationship with the issuance and cancellation of the permit. In short, he did not direct that the permit be canceled, or take lesser actions of directing that the permit be amended in certain respects to reduce the security risk -- he directed that the risk that he saw be eliminated. Under the qualified immunity doctrine as developed in the *Harlow* case, we do not examine the state of mind of Chief Judge Thompson (although, as

noted above, he denies any intention of interfering with the expression of First Amendment rights), we look only to an objective indication of whether the order made by Chief Judge Thompson violated any established and known constitutional right. There is no such indication. A court security officer reported difficulty in performing the duties of the security officer's job because of the existence of the fence. Here, it makes no difference whether the fence was there as a result of GSA's suggestion or the artist's artistic conceptions. Further, whether other action might have been taken is not relevant if removal of the perceived security problem is a rational method of dealing with the problem, leaving other refinements until after the security problem was solved. Nor has Chief Judge Thompson directed that under different circumstances the GSA could not allow the work on courthouse or other federal property. Since "good faith," "motive," or "intention," is not to be examined in considering a summary judgment based upon a claim of qualified immunity under the *Harlow* case, it must be said there is no triable issue of fact. Chief Judge Thompson is entitled to immunity for his order to remove the work of art under the doctrine of qualified immunity. The damage action as to him must, therefore, be dismissed.

c. *This Court may not grant an injunction against Chief Judge Thompson.* Plaintiff sets forth in his complaint, and in his papers, that damages are merely sought as an alternative remedy in case injunction is not available. It is apparent that the plaintiff, in this action, seeks this Court's injunction against Chief Judge Thompson directing him to allow the work of art to be displayed in its original form in its original position. Plaintiff has cited the court no authority which allows

one federal district judge to tell another how to perform judicial duties. This Court knows of no such authority. We have seen earlier in this memorandum that the Court classifies the actions of Chief Judge Thompson as a judicial action, albeit one not taken in the context of a particular case. The Chief Judge of a federal district court has substantial administrative responsibilities which are confided to him either by law or by tradition and practice. This Court knows of no authority which would permit it to direct the Chief Judge of a federal district court as to the manner in which he must perform those duties. Direction of a federal judge's future judicial action cannot, in the opinion of this Court, be handled in another district court. (Cf. *Bergh vs. State of Washington* (9th Cir. 1976) 535 F.2d 505.) Whatever review is available in the hierarchical system of federal courts must be in either the Ninth Circuit Court of Appeals or in the Judicial Council of the Ninth Circuit, depending upon whether the action sought to be corrected is judicial or administrative. Perhaps *Chandler vs. Judicial Council of the Tenth Circuit* (1970) 398 U.S. 74, 26 L.Ed.2d 100, 90 S.Ct. 1648, *reh. den.* 399 U.S. 937, 90 S.Ct. 2248, 26 L.Ed.2d 809, hints that the Judicial Council of the Ninth Circuit may make administrative directives to a district judge. Whether this is so or not, this Court is satisfied that a federal district judge may not tell another federal district judge by injunction how that judge is to handle the duties confided to him. Accordingly, the request for injunction states no cause of action.

It is concluded, therefore, that summary judgment must be granted against the plaintiff and in favor of Chief Judge Gordon Thompson, Jr.

3. *The defendants Hamilton and Waggoner are entitled to summary judgment on immunity grounds.* In this section of this memorandum, there must be distinguished the damage and injunction claim against defendants Hamilton and Waggoner from the issues involved in the review of the administrative action of the GSA under the Administrative Procedure Act. In this section of the memorandum, the Court addresses only the *Bivens* action against Hamilton and Waggoner, as individuals.

a. Defendants Hamilton and Waggoner are not entitled to absolute immunity. No major argument is urged that Hamilton is entitled to absolute immunity. It is, however, argued that Waggoner is entitled to absolute immunity as an administrative hearing officer under the doctrine of *Butz vs. Economou* (1978) 438 U.S. 478, 57 L.Ed.2d 895, 98 S.Ct. 2894. In the *Butz* case, an administrative hearing officer who performs acts "functionally comparable" to that of a judge is entitled to the same type of absolute immunity as is a judge. Immunity is afforded because (at page 514):

> "The risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women . . . persons subject to these restraints [of the Administrative Procedure Act] and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts. Those who complain of error must seek agency or judicial review."

If the regulations in this case (41 C.F.R. 101-20.705) provided for the type of hearing referred to by the Supreme Court, the doctrine of the *Butz* case would apply. But that is not the case. The regulations provide for an informal review by the superior of the deciding officer, not a due process hearing. No record is required. The issues are not required to be framed. The building manager and the grieved party have the opportunity (not necessarily in each other's presence) to orally state their reasons. "The regional officer shall affirm or reverse the buildings manager's determination based on this information." In short, the "appeal" provided for in the regulations is a mere informal administrative review without the panoply of protections envisioned by the Supreme Court in the *Butz* case. In a similar situation, the Ninth Circuit in *Bothke vs. Flour Engineers and Constructors, Inc.* (9th Cir. 1983) 713 F.2d 1405, at 1409, made clear that informal administrative review of the type specified here does not lead to *Butz*-type immunity. The Court of Appeals points out that there is no independent adjudicator in the nature of a judge, there was no transcript and exhibits as the exclusive record on which the decision is based, there were no findings and conclusions, there was no cross-examination of witnesses and the like. To which, this Court might add, there was no formal framing of issues and no presentation of witnesses, only the informal gathering of information and views by an administrator. This is not the type of administrative proceeding which will bring absolute judicial immunity.

b. *Defendants Hamilton and Waggoner are entitled to immunity under the doctrine of qualified immunity.* The qualified immunity application in the case of

Hamilton and Waggoner has some ironies. The theory of the First Amended Complaint is that a person not entitled to make determinations (Chief Judge Thompson) directed Hamilton to take certain actions, and, without warrant of law, Hamilton took the actions as directed by the judge, later affirmed on specious reasons by Waggoner. In the Court's opinion, this does not state a Bivens type of action against either Hamilton or Waggoner. If, as alleged in the complaint, Hamilton and Waggoner acted under the compulsion of an Article III judge's order, then, because there is no clearly established authority showing that they need not obey that order, they are entitled to qualified immunity. Put another way, if plaintiff's theory is, as expressed in the First Amended Complaint, that Hamilton and Waggoner were merely functionaries carrying out the orders of Chief Judge Thompson, then they should be entitled to qualified immunity unless there was clearly established legal authority saying that they had the duty not to carry out such orders. Plaintiff has cited no authority for this proposition and the Court knows of none. Accordingly, the allegations of the complaint show on their face the existence of an immunity under the qualified immunity doctrine for Hamilton and Waggoner.

There is an additional reason why Hamilton and Waggoner cannot be sued in their individual capacity. *Bivens vs. Six Unknown Federal Narcotics Agents* (1970) 403 U.S. 388, 29 L.Ed.2d 619, 91 S.Ct. 1999, allowed suit against federal officers for constitutional torts of the type provided by 42 U.S.C. 1983 for suits against state officers. However, in this case both Hamilton and Waggoner acted in a legalistic manner under the regulations. Hamilton took his action to

cancel the permit, citing to the regulations. An appeal was authorized under the regulations and reviewed under the regulations by Waggoner. Both Hamilton and Waggoner appear to have followed the procedure of the regulations. There may be an issue as to whether or not they made correct determinations, but those would be reviewable under the Administrative Procedure Act. Constitutional torts, such as assault and battery or unreasonable search and seizure without warrant, as recognized in the *Bivens* case, are not available in this situation. If there is an alternative mechanism provided by law for relief, the plaintiff must follow that mechanism. *Bush vs. Lucas* (1983) 462 U.S. 367, 76 L.Ed.2d 648, 103 S.Ct. 2404; *Davis vs. Passman* (1979) 442 U.S. 228, 60 L.Ed.2d 846, 99 S.Ct. 2264. Here, with the action taken under the regulations, the remedy provided for in federal law for review of that action is available, and is sought by plaintiff in this very case. Accordingly, the *Bivens* action is not available against Waggoner and Hamilton.

Plaintiff has also sought an injunction against Waggoner and Hamilton, apparently in their individual capacity. However, since an injunction is among the remedies available against the agency for the agency action, and it is the agency action which is sought to be remedied, there is no legitimate claim for an injunction against Hamilton and Waggoner individually.

Summary judgment must be granted to Hamilton and Waggoner.

4. *Summary judgment is denied as to the General Services Administration.* Plaintiff seeks to review the action of the General Services Administration. This

review is under the Administrative Procedures Act. Plaintiff challenges the action of Hamilton in canceling his permit and of Waggoner in denying the appeal from that cancellation.

a. *Jurisdiction.* The district court has jurisdiction under 5 U.S.C. 702. The Public Buildings Cooperative Use Act, and regulations (41 C.F.R. Subpart 101-20.7 through 101-20.709 have no specific provision for court review of final agency action. Accordingly, this Court has original jurisdiction for "non-statutory" review of final GSA action under 5 U.S.C. 702. With the absence of any special statutory review provided by statute, any applicable form of legal action, including action for declaratory judgment, writ of prohibition, or mandatory injunction is available (5 U.S.C. 703). The action may be brought against the agency under its official title, as has been done here. Accordingly, this Court may review the action of the GSA in canceling the permit. The Court reviews the agency action for "abuse of discretion," including alleged abused discretion involving claims of violation of "constitutional, statutory, regulatory, or other legal mandates or restrictions . . ." (*Ness Investment Corp. vs. U.S. Department of Agriculture* (9th Cir. 1975) 512 F.2d 706, 715. *See also United States vs. Carter* (9th Cir. 1983) 704 F.2d 1063). The APA has codified much of the court-made law as to the reviewable questions, which include the lawfulness of orders on constitutional and statutory provisions, whether action is arbitrary, capricious, or an abuse of discretion, contrary to constitutional right or privilege, and whether the action followed the correct procedures. (5 U.S.C. 706.)

b. *Triable issues of fact on the administrative review exist.* The facts submitted to the Court do not warrant summary judgment in favor of the GSA on the challenge as to administrative review. In the first place, there is presented a triable issue of fact as to the ground on which the GSA in fact canceled the permit. Plaintiff in his complaint, substantiated by Chief Judge Thompson's declaration, takes the position that the permit was canceled by reason of the directive of Chief Judge Thompson. The GSA finding rendered by Mr. Waggoner, to the contrary, affirms the cancellation because the action was moot (on the ground by the time Mr. Waggoner decided the appeal, the permit had lapsed) and also on the ground that the application did not fully describe the work of art. However, it appears that even as to the latter ground, there is an issue of fact, *i.e.*, whether the fence, the object pointed to by Mr. Waggoner as not included in the application, was suggested by the GSA itself through a lower-ranking and presumably non-authorized employee, or was inserted by the artist after failure of full disclosure. Procedural problems also exist; it appears that no record was presented to Mr. Waggoner on the question of how the fence got around the art object, which may result from the circumstance that the original grounds for cancellation of the permit by Mr. Hamilton were not sufficiently set forth to allow plaintiff Avalos to present his position to Mr. Waggoner.

Lastly, the question of remedy is to be considered. It may be reasonably arguable that canceling the permit altogether was an abuse of discretion in the light of other, less severe, potential remedies which might possibly have been put in place (i.e., as possibilities and not to the exclusion of others, removal of the fence,

posting of a guard at plaintiff's expense, placing the art object on other government property with comparable public exposure but lesser security considerations, etc.). All of these are matters which might be explored on a judicial review of administrative action and which are not obviated by the existence of uncontradicted facts on this motion for summary judgment. Not to be lost in this discussion are also the First Amendment considerations so urgently advanced by plaintiff. Classic First Amendment doctrine provides that restriction on First Amendment expression must be narrowed to meet only the overriding governmental interest to be accommodated. There is room for argument here that cancellation of the permit was too broad a result if, as seems possible on this record, other narrower actions which accommodated the security needs seen by Chief Judge Thompson are feasible. Accordingly, the motion for summary judgment and to dismiss by GSA is denied.

5. *Further procedural steps.* A judgment is to be entered for the defendants Thompson, Hamilton and Waggoner. There being no just reason for delay, that judgment will be determined to be a final judgment at this point under Rule 54. This memorandum will serve as the Court's finding of uncontradicted facts and conclusions of law; no further findings and conclusions need be submitted. GSA will file its answer within twenty-one (21) days. Thereafter, a status conference will be held to determine further steps in the Administrative Procedure Act review of the GSA determination.

DATED: April 16, 1987.

/s/ Harry L. Hupp
United States District Judge

SUPREME COURT, U.S.
FILED
APR 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1469

In The

Supreme Court of the United States

October Term, 1988

DAVID AVALOS and SUSHI, INC.,

Petitioners,

vs.

GORDON THOMPSON, JR., PAUL HAMILTON and PHILIP WAGGONER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT HON. GORDON THOMPSON, JR.'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a United States Court of Appeals have the authority to dismiss an appeal as moot when, during the course of the appeal, the district court renders judgment against a non-appellee defendant which grants appellants the relief sought and eviscerates the Court of Appeals' ability to render effective relief against the appellees?[1]

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[1] Respondent Thompson believes that this Petition should be denied on procedural grounds. Thus, this Brief in Opposition does not address the substantive issues. Should this Court be inclined to grant certiorari, Respondent Thompson would request an opportunity to brief the substantive issues before this Court grants the Petition.

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No. 88-1469

In The

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DAVID AVALOS and SUSHI, INC.,

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vs.

GORDON THOMPSON, JR., PAUL HAMILTON and PHILIP WAGGONER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT HON. GORDON THOMPSON, JR.'S BRIEF IN OPPOSITION[2]

[2] Michael J. Weaver and Sheppard, Mullin, Richter & Hampton have represented Judge Thompson throughout this lawsuit. Judge Thompson received this private representation because of the possibility of a conflict. The United States Department of Justice, which normally would have represented Judge Thompson herein, is representing the General Services Administration as well as GSA employees and Respondents Hamilton and Waggoner.

Respondent Hon. Gordon Thompson, Jr., respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking reversal of the Ninth Circuit's Order dismissing petitioners' appeal without prejudice. That Order is unpublished.

OPINIONS BELOW[3]

In addition to the opinions set forth in the Petition (Pet., p. 2), Respondent Thompson believes that the district court's opinion regarding the General Services Administration was material to the Ninth Circuit's decision and is relevant to this Court's determination. The text of the district court's Minute Order directing that its Proposed Findings of Fact, Conclusions of Law, and Memorandum of Decision ("Memorandum of Decision") and Proposed Judgment ("Judgment") are final and filed is reprinted in the Appendix hereto as pages A-1 to A-2. The text of the Memorandum of Decision is reprinted in the Appendix as pages A-3 to A-22. The text of the Judgment is reprinted in the Appendix as pages A-23 to A-24.

[3] Respondent Thompson is satisfied with Petitioners' statements concerning Jurisdiction and Constitutional Provisions Involved (Pet., pp. 2-3). Accordingly, this Brief in Opposition does not repeat that information. *See* Supreme Court Rules, Rule 34.1(e), (f); Rule 34.2.

PRELIMINARY STATEMENT

This case does not present any "special and important reasons" which would justify this Court's granting certiorari (Supreme Court Rule 17). To the contrary, the district court's decision that the General Services Administration's ("GSA") revocation of the permit was unlawful and remand to the GSA for further proceedings rendered Petitioners' appeal moot. Any doubt regarding the mootness of the appeal was fully resolved when Petitioners voluntarily chose not to pursue the remand proceedings with the GSA. As a direct result of these developments, the Ninth Circuit properly dismissed Petitioners' appeal as moot. No compelling reason exists for this Court to disturb the Ninth Circuit's ruling.

A. Placement And Removal Of The Artwork.

In December, 1985, Petitioner David Avalos, an artist sponsored by Petitioner Sushi, Inc., filed with the GSA an application for a permit for use of space in the courtyard in front of the United States Courthouse in San Diego, California. The application was incomplete.

In part 4 of the application, rather than describe the proposed activity with any particularity, Petitioners referred to an attached packet of materials which obliquely suggested that they were seeking permission to place a large piece of artwork of painted wood construction entitled "The Tijuana Tourist Donkey Cart" in front of the Courthouse. The packet of materials contained a photograph of the life-size donkey cart without the fence-like apparatus built of wire and timbers that eventually

became a part of the display. Appellants sought permission to place the donkey cart on federal property between January 4, 1986 and January 17, 1986.

Employees of the GSA granted Petitioners' application in accordance with regulations promulgated under the Public Buildings Cooperative Use Act of 1976 (Public Law 94-541), 5 U.S.C. § 706(2). The regulations are set forth at 41 C.F.R. § 101-20.700 *et seq.*

When the artwork was installed on federal grounds in front of the Courthouse, it was completely surrounded by a wire and wood fence-like structure which effectively sealed off the donkey cart portion of the artwork. Normal inspection procedures designed to uncover surreptitiously placed incendiary devices and other security threats were thereby completely thwarted, as security guards could not gain access to the structure through the wire and wood fence. Courthouse security is taken very seriously in the Southern District of California because of past problems.

On January 5, 1986, the artwork was installed in front of, and in close proximity to, the main entrance to the United States Courthouse. On January 6, 1986, Defendant and Respondent Hon. Gordon Thompson, Jr., acting in his capacity as Chief Judge for the Southern District of California, directed the removal of the artwork, citing "security reasons" in a written memorandum. Chief Judge Thompson's directive was motivated by concern expressed to him by the building guards that the wire and wood fence surrounding the artwork prevented adequate inspection for incendiary devices. Chief Judge

Thompson consulted with the other judges of the court before issuing his written directive to the GSA.

Subsequently, and without Chief Judge Thompson's involvement, Respondent Hamilton, the GSA office manager in charge of the Courthouse, advised Petitioners that the permit was revoked. Hamilton requested that Petitioners remove the structure. Like Chief Judge Thompson, the GSA office manager cited "considerations for the security of the building and its occupants." Thereafter, the artwork was removed.

B. Procedural Posture In The District Court.

Petitioners appealed the decision revoking the permit to Respondent Waggoner, the regional director of the GSA. Before their administrative appeal was denied, Petitioners filed, on January 10, 1986, their complaint for damages and for declaratory and injunctive relief. Petitioners' original complaint named as defendants the General Services Administration, Chief Judge Thompson and Respondent Hamilton. All judges in the Southern District recused themselves because they had participated in the decision to direct the removal of the artwork.

Petitioners filed a writ of mandamus with the Ninth Circuit seeking an order directing the district court to set a hearing on Petitioners' application for a temporary restraining order. Petitioners' writ was denied by the Ninth Circuit on January 15, 1986. Because of the recusal of the Southern District's judges, the case was assigned to the Hon. Harry L. Hupp of the Central District of California.

Subsequently, Petitioners' First Amended Complaint was filed. The First Amended Complaint named as defendants the GSA as well as Chief Judge Thompson, Hamilton and Waggoner. The First Amended Complaint sought declaratory and injunctive relief prohibiting the cancellation of the permit and requiring the display of the artwork. As an alternative remedy to be sought only if the display of their art was not attainable, the First Amended Complaint sought damages.

In the Spring of 1986, Chief Judge Thompson and the GSA defendants filed separate motions to dismiss or, in the alternative, for summary judgment. The district court heard extensive oral argument and permitted the filing of supplemental memoranda of points and authorities. On April 16, 1987, the district court issued a careful, 28 page opinion granting the summary judgment motions of Chief Judge Thompson and the individual GSA defendants and denying the motion brought on behalf of the GSA. Pursuant to Federal Rules of Civil Procedure Rule 54(b), judgment was entered on May 5, 1987. On May 14, 1987, Petitioners filed their Notice of Appeal.

C. The District Court Proceedings Regarding The GSA.

On January 15, 1988, while the appeal as to the individual defendants was pending, a trial was held regarding the GSA. As a result of that trial, the district court issued its proposed and, later, its final Memorandum of Decision and Judgment. The district court found that the GSA had unlawfully revoked Petitioner Avalos' permit

and ordered the revocation set aside.[4] Pursuant to the relevant authorities, the district court remanded the matter to the GSA for further consideration rather than ordering the permit renewed and the artwork displayed.

In remanding the matter to the GSA, the district court outlined various constitutional policies which it ordered the GSA to consider in its review. The district court concluded that, while the GSA may properly consider security concerns on remand, it must take into account First Amendment considerations and narrowly tailor its action so as to protect the governmental interests involved without restricting expression unnecessarily.

The judgment entered by the district court was not final. Rather, the court retained jurisdiction, apparently to enable it to review any complaints by Petitioners of the GSA's handling of the remand proceedings. Through the district court's order and remand, Petitioners' rights were fully vindicated and protected.

On remand, the GSA invited Avalos to submit a new application for the display of his artwork. However, Avalos declined to submit a new application and, as a result of his refusal to go forward, the GSA did not undertake any further review of its previous decision revoking the permit. On October 26, 1988, pursuant to an inquiry by the district court, Petitioner Avalos notified

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[4] The district court dismissed Petitioner Sushi's claim against the GSA finding that Sushi held no permit to display artwork and therefore had no standing to pursue its claim (A-5).

the court that he was satisfied with the result of the proceedings and that the judgment previously entered on March 15, 1988 could be deemed final.

D. The Appeal.

As a result of Petitioners' notice of appeal, the appellate process continued as to Chief Judge Thompson, Hamilton and Waggoner. After full briefing by all parties, the matter was set for oral argument on March 10, 1988.

At the commencement of the oral argument the panel was informed of the district court's then proposed decision regarding the GSA. Upon learning that the district court had tentatively found that the revocation of the permit was unlawful and was prepared to remand the matter to the GSA, the panel requested that counsel address their comments to the issue of mootness. The panel then continued the matter pending the entry of the district court's order and the response of the GSA. On August 12, 1988, after the district court entered its Memorandum of Decision and Judgment as to the GSA, the Ninth Circuit dismissed Petitioners' appeal as moot.

On August 23, 1988, Petitioners filed their Petition For Rehearing And Suggestion For Rehearing In [sic] Banc ("Petition for Rehearing"). By Order dated October 20, 1988, the Ninth Circuit requested that the parties notify it of the status of any further GSA remand proceedings.

On October 26, 1988, Petitioners filed their Notice of Status with the Ninth Circuit.[5] At that time, Petitioners notified the court that the GSA had invited Petitioner Avalos to submit a new application for display of his artwork but that Avalos had declined to submit the new application. Petitioners further informed the court that they were satisfied with the district court's judgment against the GSA and had no objection to an order deeming the judgment to be final.

This update reinforced the Ninth Circuit's conclusion that the appeal was moot. Petitioners had voluntarily chosen to forego the opportunity provided to them to obtain the relief sought in their lawsuit: the reissuance of their permit and the display of their art. On December 7, 1988, the Ninth Circuit denied the Petition for Rehearing.

THE PETITION SHOULD BE DENIED

A. There Are No Special And Important Reasons To Grant Certiorari.

This Court's review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are "special and important reasons therefor." (Supreme Court Rule 17). Not only

[5] The text of Petitioners' Notice of Status is reprinted in the Appendix as pages A-25 to A-26. The text of Chief Judge Thompson's Status Report is reprinted in the Appendix as pages A-27 to A-28. The text of the GSA's Status Report is reprinted in the Appendix as pages A-29 to A-47.

does this petition fail to meet this test, but as the Ninth Circuit determined, the case underlying the petition is moot.

It is well established that the merits of an isolated case have only an oblique relevance to the question of whether a petition for certiorari should be granted. *Ponte v. Real*, 471 U.S. 491, 501 (1985) (Stevens, J., concurring). Rather, whether this Court grants review depends on numerous factors other than the perceived correctness of the judgment this Court is asked to review. *Superintendent v. Hill*, 472 U.S. 445, 460 (1985). Generally, certiorari is granted when the question is important and recurring. *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 232 (1959).

No compelling reason to grant the petition exists here. As even Petitioners admit, the issues involved herein are unique and will not recur frequently:

> "To repeat a point made above, petitioners freely acknowledge that this is a kind of dispute that does not and will not arise very often." (Pet., p. 18).

Thus, Petitioners are reduced to arguing that the Ninth Circuit failed to properly decide their appeal. While the unique facts and issues herein may provide the basis for an interesting philosophical discussion, it is not the type of compelling case which is worthy of this Court's attention. The petition should be denied.

B. The Court Of Appeals Properly Dismissed The Appeal As Moot.

As the district court recognized, the relief it could grant Petitioners was limited to holding the GSA's

revocation of the permit unlawful and remanding the matter to the GSA to reconsider its revocation of the permit. The GSA remand proceedings ordered by the district court provided Petitioners with a complete opportunity to have Avalos' permit reissued and the artwork displayed, subject only to reasonable security considerations. Because of these developments, which occurred while the appeal was pending as to the individual defendants, the Court of Appeals realized that it could not grant Petitioners effective relief against the individual respondents, including Chief Judge Thompson. The Ninth Circuit properly dismissed the appeal as moot.

The mootness of the appeal is well illustrated by *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67 (1983). In *Iron Arrow*, an all male honorary society, which had been banned from a university campus for sex discrimination, sued the university and the Secretary of Health and Human Services for declaratory and injunctive relief. The honor society attempted to prevent the Secretary from interpreting a regulation so as to require the university to ban the society's activities from campus. While the case was on appeal, the university president wrote a letter to the society chief, and so advised the court, that the society would not be allowed to return to campus unless it adopted a nondiscriminatory policy, whether the law required it or not.

This Court held that the university's unequivocal position rendered the case moot and ordered the action dismissed. This Court noted that the federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies. To satisfy the Article III case or controversy

requirement, a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision. *Id.* at 70. This Court then held that no such dispute was before it:

> "We think that no resolution of the present dispute between these parties can redress Iron Arrow's asserted grievance. Whatever the correctness of the Secretary's interpretation of the regulation in question, the University has stated unequivocally that it will not allow Iron Arrow to conduct its initiation activities on University property as long as it refuses to admit women. . . . Because of the position that the University has taken irrespective of the outcome of this lawsuit, we conclude that the case is moot . . . " *Id.* at 70, 72.

Similarly, in *Enrico's Inc. v. Rice*, 730 F.2d 1250 (9th Cir. 1984), the Ninth Circuit dismissed an appeal as moot. In *Enrico's*, a cafe owner filed an action for injunctive and declaratory relief against a price posting procedure which had been adopted by the California Department of Alcoholic Beverage Control ("Department"). While the action was pending, a California Court of Appeal held the price posting scheme unlawful and the Department announced the discontinuance of the price posting procedure.

The Ninth Circuit held the appeal was moot. After reaffirming the necessity of having an actual case or controversy before it, the court held:

> "In the case at bar we cannot see the threat of a real or immediate injury to plaintiff that is necessary to demonstrate the existence of a case or controversy. . . . Moreover, this court cannot grant appellant effective relief. Were we to reverse the district court and hold in Enrico's favor, it would receive no relief beyond that already provided by [the California court's decision]. Where events have occurred that

prevent us from granting effective relief, we lack jurisdiction and must dismiss the appeal." *Id.* at 1253-54.

Similarly here, neither the Ninth Circuit nor this Court could grant Petitioners effective relief as to Judge Thompson. By their suit, Petitioners sought to have Avalos' permit renewed and their artwork displayed. No injunction or declaratory relief against Judge Thompson could accomplish this result. Rather, it could only be done, as the district court has ordered, through the remand proceedings with the GSA.[6] It was up to the GSA, as instructed by the district court, to review its unlawful decision revoking Avalos' permit and, if appropriate, to determine under what circumstances the artwork could be displayed. Avalos himself terminated Petitioners' remedy when he refused to file another permit application and declared himself satisfied with the district court's (and apparently the GSA's) proceedings.

Since no effective relief could be granted as to Chief Judge Thompson, the Ninth Circuit properly dismissed Petitioners' appeal as moot.

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[6] As the district court noted, it could not substitute its judgment for that of the GSA. Rather, when the court finds that procedural irregularities, or lack of substantial evidence to support a conclusion exist, it must vacate the decision and remand the matter to the administrative agency for further consideration. *Camp v. Pitts*, 411 U.S. 138 (1973); *Bunker Hill Co. v. EPA*, 572 F.2d 1286 (9th Cir. 1977). Moreover, there is not now and has never been any evidence to suggest that the individual respondents will refuse to honor the final determination of the GSA.

C. The Ninth Circuit Had The Discretion To Dismiss Petitioners' Appeal.

Even if a case is not technically moot pursuant to the case or controversy provision of Article III, a court may still exercise its discretion and refuse to render a decision. The decision not to decide may be based upon policy reasons rather than purely constitutional considerations.

This was the position taken by this Court in *Kremens v. Bartley*, 431 U.S. 119 (1977). In *Kremens*, this Court refused to determine the constitutionality of Pennsylvania statutes governing the admission and commitment of a person 18 years or younger to a state mental health institution, upon parental consent and over the objection of such juvenile.

Kremens was a class action. While the claims of the named appellees had been mooted, this Court determined that the claims of other class members still existed. However, this Court declined to adjudicate those claims, stating:

> "Constitutional adjudication being a matter of 'great gravity and delicacy,' we base our refusal to pass on the merits on 'the policy rules often invoked by the Court' to avoid passing prematurely on constitutional questions. Because [such] rules operate in 'cases confessedly within [the court's] jurisdiction . . . they find their source in policy, rather than purely constitutional, considerations.' " (Citations omitted). *Id.* at 128.

See also United States v. Grant, 345 U.S. 629 (1952) (although action not moot, no abuse of discretion in trial court's refusal to award injunctive relief).

The two distinct branches of the mootness doctrine were clearly set forth by the District of Columbia Circuit in *In re AOV Industries Inc.*, 792 F.2d 1140 (D.C. Cir. 1986). There, the court refused to grant injunctive or declaratory relief even though the case was not technically moot within the meaning of the Article III case or controversy requirement.

The court discussed its authority to withhold relief:

> "Along with its constitutional aspects, *i.e.*, when the absence of a 'case or controversy' deprives an article [sic] III court of jurisdiction, there exists what we have called 'a melange of doctrines relating to the court's discretion in matters of remedy and judicial administration.' Even when the moving party is not entitled to dismissal on article [sic] III grounds, common sense or equitable considerations may justify a decision not to decide a case on the merits. Determinations of mootness in this latter sense cannot be cabined by inflexible, formalistic rules, but instead require a case-by-case judgment regarding the feasibility or futility of effective relief should a litigant prevail." (Citations omitted). *Id.* at 1147-48.

See also Community For Creative Nonviolence v. Hess, 745 F.2d 697 (D.C. Cir. 1984); *Chamber of Commerce v. United States Department Of Energy*, 627 F.2d 289, 291 (D.C. Cir. 1980).

These policies demonstrate the appropriateness of the Ninth Circuit's decision. Even if not technically moot within the meaning of Article III, the ability of the court to grant effective relief as to Chief Judge Thompson was certainly attenuated, at best. Moreover, the constitutional issues presented were difficult and included balancing First Amendment and legitimate courthouse security concerns, the power of one federal district judge to enjoin the

actions of another and the scope of immunity of federal judges. Given the difficult issues and the absence of the opportunity for effective relief, it was well within the Ninth Circuit's discretion to dismiss the appeal.

D. Petitioners' Claim For Damages Will Not Prevent A Finding Of Mootness.

In their First Amended Complaint, Petitioners seek damages as alternative relief if they are unable to obtain the display of their art. Petitioners' claim for damages will not prevent dismissal of their otherwise moot claim.

In *Tawwab v. Metz*, 554 F.2d 22 (2nd Cir. 1977), eight New York state prisoners brought a civil rights action against the officials of a certain state correctional facility claiming that their civil rights had been violated by certain policies at the facility. The inmates sought injunctive relief, declaratory relief and damages. The district court dismissed the complaint.

By the time their claim had reached the appellate court, all the inmates had been transferred to different correctional facilities. The Court of Appeals determined that their claim for injunctive relief was moot. The court further held that the claim for damages did not prevent dismissal of the action:

> "The complaint also contained a general demand for damages. Any award of damages on the facts of this case, as alleged in the complaint, would be so remote and speculative that it could not stand." *Id.* at 24, n. 4.

See also Doe v. Marshall, 622 F.2d 118, 119 (5th Cir. 1980) (claim for attorneys' fees will not salvage an otherwise moot case).

Finally, this court has upheld the dismissal of a moot case where the damages claimed were incidental to the main question. In *Alejandrino v. Quezon*, 271 U.S. 529 (1925), a Philippine Senator, who had been suspended, filed a petition to compel the restoration of his privileges and emoluments as a member of the Philippine Senate. By the time the case reached this Court, the Senator's suspension had lapsed. However, the Senator claimed he was entitled to his pay as a member of the Senate during his suspension.

Since the Senator's suspension had ended and he was acting as a full member of the Senate, this Court held that the Senator's injunction claim was moot. This Court further held that the Senator's salary claim was "incidental" to the main action and would not prevent dismissal:

> "The case having become moot as respects its main features, and the other feature being incidental and not in itself a proper subject for determination as now presented, further steps looking to an adjudication of the cause can neither be had here nor in the court below." *Id.* at 535.

Similarly here, Petitioners' alternative prayer for damages does not salvage their otherwise moot claim. Although alternative in nature, Petitioners' damages claim is modeled after *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1970) wherein this Court allowed a suit for damages against federal officers for constitutional torts. However, as the district court recognized, a *Bivens* remedy is not available where there is an alternative remedial mechanism provided by law. *See*

Bush v. Lucas, 462 U.S. 367 (1983); *Davis v. Passman*, 442 U.S. 228 (1979). Here, the remedy provided by federal law for review of the defendants' actions is available, and is sought by Petitioners in this very case. The district court has already provided this alternative relief by ordering remanded proceedings by the GSA. Accordingly, Petitioners' *Bivens* action is not available.

As in *Tawwab*, Petitioners' damages claim cannot stand. Moreover, the damages claim is merely incidental to Petitioners' primary goal of receiving a renewed permit and displaying their art. As such, Petitioners' damages claim cannot save the lawsuit from dismissal as to Chief Judge Thompson.

Since this Petition fails to set forth a compelling case for decision by this Court and the issues are moot as to Chief Judge Thompson, the Petition should be denied.

CONCLUSION

For the foregoing reasons, Respondent Hon. Gordon Thompson, Jr. respectfully submits that this Court should deny the Petition for Writ of Certiorari.

Dated: April 5, 1989.

Respectfully submitted,

MICHAEL J. WEAVER, ESQ.
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By: MICHAEL J. WEAVER

Attorneys for Respondent
Hon. Gordon Thompson, Jr.

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV86 – 0043 – HLH Date March 9, 1988

Title Avalos v. General Services Administration, et. al

DOCKET ENTRY

PRESENT:
HON. HARRY L. HUPP, JUDGE
Robert Bolton
Deputy Clerk Court Recorder (ESR)

ATTORNEYS PRESENT FOR PLAINTIFFS:

ATTORNEYS PRESENT FOR DEFENDANTS:

PROCEEDINGS: Filing of Findings, Conclusions, and Judgment

ORDER (also, if applicable, findings and memorandum opinion):

The Findings, Conclusions, and Memorandum previously served on counsel as "Proposed", are signed and filed this date. The Judgment agreed as to form by counsel is signed and filed this date.

GSA's objections are believed by the court to be adequately discussed in the Memorandum and have not led to any change.

Plaintiff's suggestion that the Memorandum be published in the Federal Supplement is noted. In the court's opinion, most opinion's published in the Federal Supplement add nothing to the law and cause an unnecessary devastation of the forests for no useful purpose. However, the suggestion that this memorandum may serve a useful purpose if published because there is little or no published matter interpreting the PBCUA has some merit. If neither party is going to take this matter to the 9th Circuit, the court will consider publishing the memorandum. The court will ask the parties to inform the court in due course if the matter is to be appealed; if not, the court will consider whether to publish the decision.

The court is unaware whether this decision may be relevant to the 9th Circuit consideration of the qualified immunity point. If either party believes so, the court requests that party to notify the 9th Circuit of this determination by sending a copy to the 9th Circuit or by otherwise including it in the appellate record.

Initials of Deputy Clerk___

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DAVID AVALOS and SUSHI, INC. Plaintiffs, vs. GENERAL SERVICES ADMIN., HON. GORDON THOMPSON, JR., PAUL HAMILTON, and PHILIP WAGGONER, Defendants.	No. CV86-0043-HLH FINDINGS OF FACT, CONCLUSIONS OF LAW, AND MEMORANDUM OF DECISION (Filed Mar. 9, 1988)

This matter was tried as to the Administrative Procedure Act issues on January 15, 1988. The evidence in the matter consisted of documents and depositions received in evidence. The matter was argued by conference telephone call, Gregory Marshall, Esq., appearing for the plaintiffs and speaking from San Diego, California; Anne L. Weismann, Esq., representing the defendant General Services Administration (GSA), and speaking from Washington, D. C., with the Court hearing argument in the Federal Courthouse in Los Angeles, California.

1. *History of this action*. This action was first filed on January 10, 1986, and an amended and supplemental complaint was filed on March 3, 1986. The complaint alleged claims against Chief Judge Gordon Thompson, and General Services Administration (GSA) executives Paul Hamilton and Philip Waggoner, and sought injunction, declaratory relief, and, alternatively, damages under

a *Bivens* theory. As amended, the complaint added a claim for administrative review under the Administrative Procedure Act (APA) against GSA. Motions to dismiss and for summary judgment were filed by all defendants. On April 16, 1987, the Court granted summary judgment to the individual defendants (Chief Judge Thompson, Mr. Hamilton, and Mr. Waggoner) based on the doctrine of qualified immunity, and this judgment is now on appeal to the Ninth Circuit Court of Appeals. The Court denied summary judgment to GSA. Thus, the issues tried were those for review of the administrative action taken by GSA.

2. *Jurisdiction.* Jurisdiction of this Court is granted by 28 U.S.C. § 1331 and the APA (5 U.S.C. § 701, *et. seq.*).

3. *Facts.* In the Order filed April 16, 1987, the Court determined that certain facts were without substantial controversy. Insofar as those facts are relevant to the APA review, they are adopted from that Order as set forth hereafter. Certain additional facts derived from the additional evidence presented on the trial of the matter are set forth. Certain facts relevant to the grant of the summary judgment motion on the *Bivens* claims and the application of the absolute and qualified immunity doctrines are not relevant to the APA issues and certain of those facts contained in the April 16, 1987 Order are eliminated from these findings, even though still without substantial controversy. The facts are found as follows:

Plaintiff, David Avalos, is an artist who has created artworks, including the one at question in this lawsuit, which contain expressions regarding the situation of alien Mexican laborers in this country. The other plaintiff,

Sushi, Inc., sponsored a showing of "street art" in the city of San Diego in January 1986. Sushi, Inc., held no permit and has no standing to participate in the portion of the case requesting administrative review. Its claim will be dismissed.

Congress has enacted authorization for certain use by the public of federal buildings and grounds. (Public Buildings Cooperative Use Act of 1976, P.L. 94-541; 40 U.S.C. § 601a; hereafter PBCUA.) GSA, whose duties include management of federal buildings, has adopted regulations under PBCUA allowing the "occasional use" of public areas in public buildings and grounds for "cultural, educational, and recreational activities." Pursuant to those regulations, GSA has developed a permit application process.

Avalos through an agent applied for a permit to display his work "San Diego Donkey Cart" (hereinafter referred to as "the work" or "the work of art") in an outdoor area on the grounds of the Federal Courthouse in San Diego located between the sidewalk and front door of the Courthouse. The place where the artwork was ultimately located was approximately 84 feet from the front door of the Courthouse and approximately 34 feet from the sidewalk. The application contained a picture of a model of the proposed work of art. The work purportedly depicted a San Diego version of a "Tijuana donkey cart" (apparently a common tourist attraction in Tijuana, consisting of a small cart pulled by a donkey in which the tourists may ride.) Avalos' work depicted a Latino on the donkey cart being frisked by a man in the uniform of a Border Patrol agent.

When Avalos' agent applied for a permit, the clerical employee of the GSA receiving the application inquired as to what precautions there were to prevent damage to the display by children climbing over the display. There is a dispute of fact as to whether the clerical employee suggested a fence. Avalos' agent so testified. The clerical employee recalls being concerned about the safety of the work displayed, but does not recall suggesting a fence. The Court resolves this dispute by finding that the employee suggested that Avalos consider a fence or other protective device to protect the display. When this matter was reported to Avalos, he agreed that such would be appropriate, expressing the thought that such a fence was in consonance with the artistic message intended to be conveyed. Accordingly, when erected, the representation of the "San Diego donkey cart" was surrounded by a stout fence consisting of wooden posts, chain link, and barbed wire, securely enclosing the work. The application, however, was never amended to show the existence of the fence, its appearance, or its construction. The GSA employee had no authority to suggest any modifications in the display. The Court concludes that Avalos caused the fence to be erected because it was in accordance with the artistic impression he intended to create and that Avalos fully adopted the fence as a part of his artistic display.

The permit was duly issued by GSA for the period January 4, 1986, to January 17, 1986. Mr. Avalos' work of art was installed on Sunday, January 5, 1986. The next morning, Monday, January 6, 1986, defendant Gordon Thompson, Jr., Chief Judge of the United States District Court for the Southern District of California was

approached by a building guard. The record does not reveal whether the guard was an employee of the Federal Protective Service (the security arm of the GSA) or of the United States Marshal (the security arm of the Federal District Court). The building guard advised Chief Judge Thompson that in the opinion of the security staff the artwork constituted a security hazard. The building guard reported that the structure could not be routinely inspected and that the wire and wood fence prevented the guard from making close inspections for any explosive device or other dangerous material. During the noon hour, Chief Judge Thompson conferred with the other judges of the court. The judges agreed that the structure constituted a security threat. At approximately 3 p.m. on January 6, Chief Judge Thompson informed defendant Paul Hamilton, GSA's manager of the courthouse building, of the position of the court and specifically requested that the sculpture be removed because of the perceived security threat. Mr. Hamilton requested that Chief Judge Thompson confirm this position in writing. Chief Judge Thompson then wrote a memo to Mr. Hamilton the text of which stated as follows:

> "For security reasons you are hereby directed forthwith to cause the removal of the structure standing in front of the United States Courthouse."

The memorandum was signed by Chief Judge Thompson. Mr. Hamilton orally advised Mr. Avalos that Chief Judge Thompson had directed removal of the artwork.

Following Mr. Hamilton's phone call to Mr. Avalos on January 6, a letter from Mr. Hamilton was delivered to Mr. Avalos dated that same day which reads in part:

> "The permit for use of space in public buildings and grounds issued to you on December 10, 1985, is hereby revoked. Please have the piece removed not later than 8 p.m. this date.
>
> This action is taken based on the provisions of Federal Property Management Regulations, Title 41, Code of Federal Regulations, Chapter 101, paragraph 101-20.7 and considerations for the security of the building and its occupants."

Mr. Avalos did not remove the artwork. Thereafter, employees of GSA removed the artwork and stored it until picked up by Mr. Avalos.

Mr. Avalos consulted the American Civil Liberties Union, whose attorney represents Mr. Avalos in this lawsuit. This lawsuit was intitially filed on January 10, 1986. A First Amended Complaint was filed on March 3, 1986. (The First Amended Complaint contains allegations of facts occurring after January 10, and to that extent should have been denominated a "First Amended and Supplemental Complaint." The Court so considers it.) In addition to filing this action, Mr. Avalos pursued administrative remedies under the GSA regulations. The regulations (41 C.F.R. §§ 101-20.7, *et seq.*) provide the grounds for disapproval of or cancellation of a permit. Section 101-20.704, provides for a type of "appeal" from a cancellation of a permit. The appeal allowed, however, is not a full due process type administrative hearing, but instead consists of an application for review to the GSA "regional officer" (the immediate supervisor of the building manager), who shall conduct an informal review, including hearing orally from both the building manager and from the appellant and shall render a decision. A decision is to be rendered within ten days of the time the

appeal is received by the regional officer. The regional officer reviewing Mr. Avalos' appeal was defendant Philip Waggoner, whose official title is "Director of Buildings Management Division, Region 9 of the General Services Administration."

The filing of this lawsuit on January 10, 1986, coincided with the filing of the administrative appeal, which was received by GSA on January 13, 1986. In his consideration of the appeal, Mr. Waggoner conversed with Mr. Hamilton on several occasions, and with one of Mr. Hamilton's subordinates. He did not discuss the case with the clerical employee who had dealt with Avalos' agent in receiving the application for the permit. On the ninth day after receipt of the appeal, Mr. Waggoner called Mr. Avalos and asked whether Mr. Avalos wanted to submit any further material beyond his letter of January 10. Mr. Avalos replied that he wished to submit no further material. Mr. Avalos was not told that Mr. Waggoner was considering other grounds for affirming the appeal than those set forth in Mr. Hamilton's letter revoking the permit. Mr. Avalos was also not advised that he could make an oral presentation. On January 23, 1986, the tenth day after receipt of the appeal, Mr. Waggoner denied the appeal. He stated first that the appeal was moot, as the permit had expired on January 17, 1986. He also set forth an alternative ground, as follows:

> "Secondly, when the permit was issued, your display was understood to be open. However, when erected, unlike photographs supplied with your application, your display was enclosed completely by a fence approximately 8' by 10' and made up of two-by-fours, barbed wires, and chain link fence. Thus, your display varied from your application."

Thereafter, as set forth above, the complaint in this action was amended to include an action for court review under the Administrative Procedure Act.

4. *GSA regulations.* At the time of the appeal in question, GSA regulations dealing with the Public Buildings Cooperative Use Act (PBCUA) were contained in 41 C.F.R. Chapter 101-20.7, *et. seq.* (The regulations have subsequently been amended somewhat and are now found in 41 C.F.R. 101-20.4, *et. seq.*)

Reference hereafter will be to the regulations in effect at the time. The full text of the regulations has been received in evidence and the Court takes judicial notice of them. In substance, the regulations are adopted by GSA to carry out the determination by Congress that federal public buildings may be used for "cultural, educational, and recreational activities." The regulations set up a permit system under which one desiring to use a public building or area may submit an application for a permit and provide certain specified information. A failure to provide the specified information leads, under the regulations, to a denial of the permit (41 C.F.R. 101-20.702(d)). Grounds for disapproval of an application for a permit or for cancellation of a permit are set forth in 41 C.F.R. 101-20.703(a). The permit may be denied or canceled, *inter alia,* when the use allowed "disrupts the official business of the agency or agencies occupying the public buildings"; "interferes with a tenant's quiet enjoyment of their leasehold"; or "pertains to any judicial proceeding then pending in the public building and this use is intended to influence or impede the judicial proceeding"; and, lastly, when the use "is being conducted with a

permit issued in response to an intentionally false or incomplete application."

When a permit is disapproved or canceled, the applicant or permittee has five days to appeal (41 C.F.R. 101-20.704(a)). The regulations provide:

> "Although a trial-type hearing or presentation is not required, the applicant or permittee and the Buildings Manager shall have the opportunity to orally state the reasons that the application or cancellation should or should not be approved. Written materials and documents may also be submitted. The Regional Officer shall affirm or reverse the Buildings Manager's determination based on this information." (41 C.F.R. § 101-20.704(b))

The Regional Officer must make this determination within ten days of receipt of the appeal, or the permit is deemed granted or the cancellation set aside.

5. *Standard of review.* The APA provides that judicial review may be had of administrative action (5 U.S.C. § 702). Where the statute creating the administrative agency provides a method of review, the Court is to follow that method. In the absence of a method of review provided by statute, "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus" may be brought in a court of competent jurisdiction (5 U.S.C. § 703). Such is the case here; neither the PBCUA nor the administrative regulations provide for a method of court review. Accordingly, the review is a non-statutory review pursuant to Section 703 of the APA. The scope of review is set forth in 5 U.S.C. § 706. The Court may direct that agency action be set aside if found to be

"arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. § 706(2)(A), "contrary to constitutional right. . . ." (Section 706(2)(B); or "without observance of procedure required by law" (Section 706(2)(D)).

6. *Record on review.* GSA argues that the Court is limited to considering the application for a permit, the permit, Mr. Hamilton's letter canceling the permit, and Mr. Waggoner's determination on administrative appeal, because those items are the "administrative record." The Court does not agree. Were this a review of an administrative proceeding where issues are framed by administrative pleadings, where evidence is taken consonant with due process (that is, with both parties represented, with evidence taken under oath, and with direct and cross-examination), and with findings of fact made, the Court would agree that it should decide the case on the basis of the administrative record. However, the administrative review here was not that kind of proceeding. No issues were framed. No evidence in the formal sense was taken. Mr. Avalos did not know what facts were being gathered or considered by Mr. Waggoner. Mr. Waggoner made no record of what information he had gathered. Thus, GSA is incorrect, in the Court's opinion, when it argues that it is restricted to the "administrative record," there being no such.

The case cited by GSA for its argument, *Florida Power & Light Co. v. Lorion* (1985) 470 U.S. 729, 84 L.Ed.2d 643, discusses certain of these considerations. GSA quotes the case as stating that:

> "A formal hearing before the agency is in no way necessary to the compilation of an agency record

> . . . agencies typically compile records in the course of informal agency action. The APA specifically contemplates judicial review on the basis of the agency record compiled in the course of informal agency action in which a hearing has not occurred."

The difficulty with citing that passage in this case is that there is no agency record of facts at all. The Court determines that where the agency action, taken by the reviewing administrative officer, is not based upon an administrative record, it may consider relevant factual evidence to determine whether the action taken by the agency is "arbitrary, capricious, and an abuse of discretion." Thus, the deposition testimony of Mr. Waggoner, Mr. Hamilton, and Ms. Hill (the clerical employee) were admitted over GSA's objection. (Cf. *Camp v. Pitts* (1973) 411 U.S. 138, 36 L.Ed.2d 106; *Bunker Hill Co. v. EPA* (9th Cir. 1977) 572 F.2d 1286, 1292; *Doria Mining and Engineering Corp. v. Morton* (9th Cir. 1979) 608 F.2d 1255, 1258. This Court fully understands that where an administrative record was developed below in a more formalized proceeding, it would normally be limited to a review of that administrative record. However, such is not the case here.

In this case, the regulations above summarized provide for an informal administrative review. The reviewing officer is not to frame issues, take evidence, and make findings, but is merely to confer orally with the subordinate GSA personnel and the applicant, and informally and summarily decide the appeal. There is nothing inherently wrong with such a regulation; all administrative action need not be based upon a full post formal hearing administrative record. However, when challenged in court on a non-statutory review under the APA, the Court must be free to allow the development of

sufficient facts to show whether the determination was arbitrary, capricious, and an abuse of discretion, or impermissibly impinged upon constitutional rights, or followed the prescribed procedure. Thus, evidence outside the "administrative record" was received by the Court for this limited purpose.

7. *Evaluation of the record.* GSA correctly asserts that the decision to be reviewed is the final decision of the agency, not interim decisions (5 U.S.C. § 704; *Williams v. Bell* (D.C. Cir. 1978) 587 F.2d 1240, 1246 n.51). Thus, a number of hotly contested inferences argued by the parties are not here to be considered. When Mr. Hamilton initially revoked the permit, he made vague all inclusive reference to the regulations, and also indicated that the permit was revoked on security grounds. That letter had been preceded by Chief Judge Thompson's directive to remove the work for security reasons. However, upon review of Mr. Hamilton's decision, the affirmance of the cancellation of the permit was placed by Mr. Waggoner on different grounds. Mr. Waggoner did not affirm the cancellation of the permit for security reasons; he made no reference to security. Neither did he point to the first nine grounds listed in 41 C.F.R. § 101-20.703(a)(1) thru (9). Instead, he affirmed the cancellation of the permit on two grounds: first, that it was moot, the permit period having expired, and second, that the application was incomplete in that it did not show the existence of the fence placed around the display. The latter is an obvious reference to Section 101-20.703(a)(10) which refers to a display "conducted with a permit issued in response to an intentionally false or incomplete application." It is therefore,

necessary, to review the evidence on the two grounds relied upon by Mr. Waggoner.

a. *Affirming cancellation of the permit on the ground of mootness was arbitrary, capricious, and an abuse of discretion.* By the time Mr. Waggoner decided the appeal, the time specified in the permit had run its course. The problem with declaring the appeal moot is that the appeal process itself is what made the appeal moot. This is a "Catch 22." If the application for a permit had been denied in the first place and appealed, this ground certainly would not have been relied upon. To say that the passage of time caused by the administrative appellate process can itself create grounds for denial of the cancellation of the permit is a logical absurdity. If the permit should not have been canceled, or should have been allowed to stand with modifications, then the plaintiff should be allowed to display his work of art in a modified period of time equal with the remaining length of time granted on the initial permit. In this respect, the Court believes that the time during which the work may be exhibited is tolled during the period of time it was not allowed to be exhibited, and the decision to the contrary is arbitrary and capricious, since in effect it nullifies the whole appeal process provided for in the regulations.

b. *Affirming cancellation on the basis that the application was incomplete was, on the facts of this case, an abuse of discretion and without observance of the procedure required by law.* The determination by Mr. Waggoner that the application was incomplete has a basis in the facts. The application as filed by Mr. Avalos' agent did not make reference to the fence consisting of wood two-by-fours, chain link and barbed wire. The fence was added to the display by

Mr. Avalos after the application was filed. While the original suggestion that some protection be added to the artwork may have come from a low level non-authorized GSA employee, the addition of the fence must be considered to be an addition to the artwork by Mr. Avalos in this case. He enthusiastically accepted the suggestion as consonant with the message he desired to convey, and designed the fence. The application was not amended. To this extent, the application was "incomplete," although a low level non-authorized GSA employee, who had no decision making power, had discussed the subject matter with Mr. Avalos' agent. The management employee granting the permit had no knowledge of the fence. It is unclear whether such knowledge would have affected the issuance of the permit and the record does not permit answer to that question.

Plaintiff argues that the regulation should be construed so that the incompleteness of the application must be intentional. The Court does not construe the regulations in that way. The regulations refer to "an intentionally false or incomplete application." It is determined that the word "intentionally" modifies "false," but not "incomplete." This interpretation appears necessary to carry out the intent of the regulations, which is to allow the building manager to see that the proposed display complies with GSA regulations. Such function cannot be accomplished unless the application is materially complete, whether or not the failure to make the application complete is intentional or not. Accordingly, the Court construes the word "intentionally" to modify "false" but not "incomplete." Thus, the application could have been disapproved, or the permit canceled, if the application

was incomplete in a material respect. The existence of the fence was material. This interpretation reached above is reinforced by the amended version of the regulations (see present 41 C.F.R. § 101-20.403(a)(1) which allows disapproval or cancellation if "the applicant has failed to submit all information required under Section 101-20.401, or has falsified such information"). Thus, the finding by Mr. Waggoner on review is supported by substantial evidence.

However, there are procedural problems with Mr. Waggoner's determination. Under Section 706, the Court must set aside agency action found to be "without observance of procedure required by law." Mr. Avalos was never given notice that the non-description of the fence in the application was considered to be a problem. The original ground conveyed to him was that the work was a security risk. While the regulations provide that Mr. Avalos was authorized to make an oral presentation to the reviewing executive, he was never allowed to do so. While he was asked if he wished to submit other materials, but was not asked is he wished to make any oral presentation. In addition, he was not informed by Mr. Waggoner when the inquiry was made about additional materials that there was any thought of affirming the cancellation of the permit because the application was incomplete. A fair procedure requires that Mr. Avalos be given a chance to make an oral presentation on the items to be relied upon by the reviewing officer. Had such an opportunity been given, Mr. Avalos could have explained how it came to be that a fence was around the object, and might have achieved a modified result (removal of the fence), or other result consonant with exhibition of his

work under the regulations. Thus, the Court finds that while the grounds specified by Mr. Waggoner are supported by substantial evidence, it also finds that the conclusion was reached without allowing the oral presentation required by the regulations as interpreted to allow an oral presentation on the items to be considered by the reviewing executive.

8. *The matter must be remanded for further administrative appellate review by GSA.* As pointed out by GSA in its trial brief, the Court may not substitute its judgment for that of the administrative agency. When it finds that procedural irregularities, or lack of substantial evidence to support a conclusion, exist, it must vacate the decision and remand the matter to the administrative agency for further consideration (*Camp v. Pitts* (1973) 411 U.S. 138, 36 L.Ed.2d 106; *Bunker Hill Co. v. EPA* (9th Cir. 1977) 572 F.2d 1286). Thus, the Court may not determine what action is to be taken by the agency or direct that the agency proceed in a particular manner. It must remand the matter to the agency for its consideration in view of the determinations made by the Court based upon the administrative record.

9. *Constitutional considerations.* There has thus far not been mentioned in this memorandum the constitutional considerations advanced by the plaintiff. Yet they underly an important point which must be considered on remand by the agency. Plaintiff's work contains an expression of social and political viewpoints. While such social and political viewpoints may not be necessary for First Amendment protection, certainly such an expression of viewpoint brings the First Amendment into sharp focus. Plaintiff's basic theory in this case is that all of the

reasons given by the defendants are a mere sham and pretense, and that the real reason was that the individual defendants disapproved of the social and political viewpoint expressed by the artwork. Each defendant has denied being so motivated. As the Court explained in its Memorandum on the granting of summary judgment, the individual motivations of the defendants are not relevant when considering qualified immunity, and therefore no inquiry has been made into those motivations and thoughts. No findings have been made upon them.

It is true, as acknowledged by plaintiff during oral argument, that the government need not make public buildings devoted to particular purposes open to displays of works or displays at all (unless the building has become a "public forum"). (*Perry Education Assn. v. Perry Local Educator's Assn.* (1983) 460 U.S. 37, 46, 74 L.Ed.2d 794, 805 (Public property not by tradition a forum for public communication may be reserved for its intended purposes, as long as restraint is reasonable and not an effort to suppress a particular viewpoint); *United States v. Grace* (1983) 461 U.S. 171, 75 L.Ed.2d 736.) However, Congress in the Public Buildings Cooperative Use Act has required a different policy, *i.e.*, that buildings otherwise devoted to particular government purposes may be opened for displays of artworks. Neither Congress nor GSA in its regulations has placed a content qualification on the types of works which might be displayed, and it is doubtful if such could be placed consonant with the First Amendment. Accordingly, it is clear, and nobody has disputed, that Mr. Avalos' work could not be rejected for display because of its content. Only if the work interfered with the use of the building for its intended purpose by

the government could the work be rejected. Thus, GSA's regulations properly do not provide as a ground for disallowance of a permit such action based on the content of the art or other work, with the exception of allowing disapproval for obscene works (41 C.F.R. § 101-20.703(7)). However, the work may be rejected if it "disrupts the official business of the agency or agencies occupying the public buildings" and "interferes with a tenant's quiet enjoyment of their leasehold." (These grounds are sufficiently broad to include security considerations.)

These considerations lead to several important points to be considered by GSA's appellate reviewing officer on remand. The work of art may not be rejected because of its expressive content, a point not disputed by anybody. Contrary to plaintiff's contention, however, the proper use of the building as a courthouse, with implications for security requirements of federal judicial business, may be considered. GSA's administrative appellate decision did not rely upon the security considerations relied upon by the building manager. On remand, however, if security considerations are relevant, then they may be considered.

There is an additional constitutional point which must be considered. When First Amendment considerations are involved, then the action to be taken must be narrowly tailored so as to protect the government interests involved but not be broader than the necessity requires. The actions must also be content neutral and leave open alternative channels for communication. (*Clark v. Community for Creative Nonviolence* (1984) 468 U.S. 288, 293, 82 L.Ed. 2d 221; *City Council of Los Angeles v. Taxpayers for Vincent* (1984) 466 U.S. 789, 80 L.Ed.2d 772; *United States v. Grace* (1983) 461 U.S. 171, 75 L.Ed.2d 736;

Perry Education Assn., supra; Heffron v. International Society for Krishna Consciousness (1981) 452 U.S. 640, 69 L.Ed.2d 298.) Thus, if it be believed that the fence provides a security risk, or that the application is incomplete by reason of the failure to describe the fence, then the reviewing officer may consider whether the work of art, with fence, may be erected at some other site where it does not provide a security problem, or may be displayed in a way which obviates the security problem (*i.e.*, without the fence, or with openings in the fence). In summary, without determining how the matter is to be resolved by GSA, not within this Court's function, GSA may consider whether placement at another location or modification of the display as shown are necessary conditions upon reinstating any permit, if such is warranted by the facts found to exist. GSA's hearing officer may not be convinced, after hearing presentations of the parties, that the fact that the fence was initially suggested as a possibility by GSA clerical employee excuses the failure to later add the fence to the already filed application. However, if such decision is made, GSA must keep in mind the necessity for narrow restrictions on displays so as to permit First Amendment expressions without impinging on necessary governmental functions.

10. *Conclusion.* Judgment will issue requiring setting aside the decision of GSA's Regional Director of the Buildings Management Division of GSA and remanding the same to GSA for further action in accordance with this determination. Plaintiff is to provide a proposed form of Judgment. It is contemplated that this Memorandum will be the Court's Findings and Conclusions. The

judgment remanding the matter may not be a final determination for appellate purposes. If so, the Court will consider certification of the judgment on the request of a party desiring appellate review of the decision.

DATED: March 9, 1988.

HARRY L. HUPP
United States District Judge

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Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

DAVID AVALOS, et al., Plaintiffs,	)	No. 86-0043-HLH
v.	)	*JUDGMENT*
GENERAL SERVICES ADMINISTRATION, Defendant.	)	(F.R.Civ.P., rule 54) (Filed Mar. 9, 1988)

This matter came on for trial as to the Administrative Procedure Act issues on January 15, 1988. Gregory Marshall appeared on behalf of plaintiffs. Anne L. Weismann appeared on behalf of defendant General Services Administration. The court admitted documentary evidence, as more fully described at pages 10 to 13 of the Memorandum of Decision filed and entered previously with regard to this proceeding. The court heard argument of the parties and took the matter under submission.

IT IS HEREBY ADJUDGED AND DECREED AS FOLLOWS:

1. Sushi, Incorporated, a named plaintiff in this case, has no standing to pursue relief as against defendant General Services Administration and, accordingly,

its claim(s) against General Services Administration are dismissed.

2. The action of General Services Administration in January, 1986, cancelling or revoking a permit previously issued to plaintiff David Avalos under terms of the Public Buildings Cooperative Use Act of 1976, and regulations thereunder, is held unlawful and is set aside.

Date: Mar 9, 1988

/s/ Harry L. Hupp
HARRY L. HUPP
United States District Judge

Approved as to form:

/s/ Anne L. Weismann
ANNE L. WEISMANN

Attorney for Defendant

/s/ Gregory Marshall
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID AVALOS, et. al., Plaintiffs/Appellants,	)	No. 87-5939
v.	)	
GENERAL SERVICES ADMINISTRATION, et. al., Defendants/Appellees.	)	

PLAINTIFF'S NOTICE OF STATUS

The Court has inquired regarding the status of any further General Services Administration remand proceedings since June 28, 1988.

The General Services Administration has conducted no remand proceedings in this matter since June 28, 1988, nor has the GSA conducted any remand proceedings since entry of the District Court Judgment on March 15, 1988 (copy attached) which concluded:

> "The action of General Services Administration in January, 1986, cancelling or revoking a permit previously issued to plaintiff David Avalos under terms of the Public Buildings Cooperative Use Act of

1976, and regulations thereunder, is held unlawful and is set aside."

The General Services Administration did invite the plaintiff to submit a new application for display of his art work but plaintiff has declined to submit a new application. The GSA has not undertaken any further review of its previous unlawful decision cancelling or revoking the original permit.

The District Court has requested the parties show cause in writing why the judgment against the General Services Administration should not be deemed a final judgment. (Minute Order attached.) Expressing satisfaction with the judgment against the GSA, plaintiff has advised the District Court that he has no objection to an order deeming the judgment to be final. (Response of Plaintiff David Avalos to OSC Why Judgment Should Not Be Deemed Final, attached.)

In any event, the status of General Services Administration proceedings has no real pertinence to the decision in this appeal which only raises issues regarding the availability of damages and declaratory relief against the individually named defendants.

Respectfully submitted,

DATE: Oct. 26, 1988 /s/ Gregory Marshall
GREGORY MARSHALL
Attorney for Plaintiffs

SHEPPARD, MULLIN, RICHTER & HAMPTON
A Partnership Including
Professional Corporations
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID AVALOS and SUSHI, INC., Plaintiffs-Appellants, v. GENERAL SERVICES ADMINISTRATION; HON. GORDON THOMPSON, JR.; PAUL HAMILTON; PHILIP WAGGONER, Defendants-Appellees.	Case No. 87-5939

STATUS REPORT

By Order dated October 20, 1988, the parties were requested to advise the Court, no later than November 2, 1988, of the status of any further General Services Administration proceedings.

Defendant and appellee, The Honorable Gordon Thompson, Jr., has no information responsive to the Court's request. No one has advised Judge Thompson or

his counsel of any developments since the Ninth Circuit dismissed the appeal as being moot in August of 1988.

In a pleading dated October 26, 1988, counsel for the Plaintiffs and appellants advised this Court that there are remaining issues relating to both money damages and declaratory relief which should be considered in connection with the dismissed appeal. It is our position that the dismissed appeal has been and remains moot. The plaintiffs-appellants were provided with specific rights and remedies by the District Court which they have apparently elected not to pursue. It is their own conduct and not that of any of the defendants-appellees which has led to the current situation.

DATED: October 28, 1988.

SHEPPARD, MULLIN, RICHTER
& HAMPTON

By: /s/ Michael J. Weaver
MICHAEL J. WEAVER
Attorneys for Defendant-
Appellee
THE HONORABLE GORDON
THOMPSON, JR.

(SEAL) **U.S. Department of Justice**
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Washington, D.C. 20530
NOV 1 1988

Cathy Catterson, Clerk
United States Court of Appeals
for the Ninth Circuit
Post Office Building
7th & Mission Streets
San Francisco, CA 94103

Re: *David Avalos v. General Services Administration (9th Cir. No. 87-5939), Appeal Dismissed 8/12/88*

Dear Ms. Catterson:

On August 12, 1988, the Court dismissed the appeal in this case without prejudice, pending resolution of proceedings on remand before the General Services Administration ("GSA"). By order of October 20, 1988, the Court requested all parties to advise it, by November 2, 1988, "of the status of any further General Services Administration remand proceedings since June 28, 1988." We wish to advise the Court, on behalf of GSA, as follows.

This Court stayed the appeal in this case, and then dismissed the appeal without prejudice, because it believed that the action taken by GSA on remand would provide the plaintiff with a suitable remedy, *i.e.* a permit to display his work of art at the federal court house in San Diego. However, while GSA informed the plaintiff that it was ready and willing to comply with Federal District Court Judge Hupp's remand order, the plaintiff

has refused to cooperate with GSA in every respect. He has refused, for example, to even submit information to GSA concerning the dates he would like to have his work of art displayed at the federal courthouse. The plaintiff has thus made it impossible for GSA to comply with the district court's order.

Accordingly, the government has moved in the district court to have the plaintiff's case dismissed.

We have attached to this letter, for the Court's information, the government's Notice of Status, filed with the district court on July 29, 1988, and its Response to Order to Show Cause And Motion to Dismiss, filed with the district court on October 27, 1988. These documents set out plaintiff's refusal to cooperate in elaborate detail.

Very truly yours,

/s/ Richard A. Olderman
RICHARD A. OLDERMAN
Attorney, Appellate Staff
Civil Division

Enclosures

cc: Gregory Marshall, Esquire
432 "F" Street, Suite 205
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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

DAVID AVALOS, et al., Plaintiffs, v. GENERAL SERVICES ADMINISTRATION, Defendant.	)	No. 86-0043-HLH *DEFENDANT'S RESPONSE TO ORDER TO SHOW CAUSE AND MOTION TO DISMISS*

On July 29, 1988, defendant filed a Notice of Status with the Court regarding the above-captioned action. The purpose of this notice was to advise the Court that defendant had made a reasonable, good-faith effort to comply with the Court's remand order of March 9, 1988, and bring this matter to a close, but that plaintiff had steadfastly refused to cooperate in this effort. Specifically, plaintiff has refused to provide defendant with the information needed to reconsider his permit application, such as the dates and location requested for the proposed work of art. Instead, plaintiff asserted that he would not

take any steps towards resolving his administrative proceeding until the Ninth Circuit had ruled on his appeal of the denial of his *Bivens* claims. In addition, plaintiff claimed that he was under no duty to supply the information requested by defendant, or in the time frame proposed by defendant.[1]

On August 12, 1988, the Ninth Circuit dismissed plaintiff's appeal without prejudice. Since that date plaintiff has taken no steps to secure the display of his artwork with defendant. He has still failed to provide the General Services Administration with proposed dates and locations for his artwork, despite the fact that the ground for his earlier refusal to cooperate – the pendency of his Ninth Circuit appeal – has been rendered moot.

In the face of plaintiff's uncooperative behavior, there is nothing left for the General Services Administration to do. It has attempted to reconsider plaintiff's application in as timely a manner as possible, but plaintiff has not cooperated in that effort. Indeed, plaintiff has expressly admitted that he is in favor of delaying the administrative decision (Plaintiff's Notice of Status, p. 3). Accordingly, plaintiff's conduct should be construed as a waiver of the cure of a new permit, and this action should be dismissed with prejudice.

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[1] The Court respectfully referred to Defendant's Notice of Status for a discussion of the history of this action at the administrative level since March 9, 1988, the date of the entry of judgment.

CONCLUSION

For the foregoing reasons, the Court should dismiss this action with prejudice.

Respectfully submitted,

JOHN R. BOLTON
Assistant Attorney General

/s/ Brook Hedge/alw
BROOK HEDGE

/s/ Theodore C. Hirt/alw
THEODORE C. HIRT

/s/ Anne L. Weismann
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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

DAVID AVALOS, et al., Plaintiffs,	)	
v.	)	No. 86-0043-HLH
GENERAL SERVICES ADMINISTRATION, Defendant.	)	*ORDER*

The Court has considered defendant's motion to dismiss and the entire record herein. In view of the fact that plaintiff has elected not to proceed with his administrative remedies, and defendant has satisfied the terms of the remand order of March 9, 1988, to the best of its ability, and there is no reason for the Court to retain jurisdiction, it is hereby ordered that this action be and hereby is dismissed with prejudice, each party to bear its own costs and attorney's fees.

DATED: _____

_____
UNITED STATES
DISTRICT JUDGE

JOHN R. BOLTON
Assistant Attorney General
BROOK HEDGE
THEODORE C. HIRT
ANNE L. WEISMANN
United States Department
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Attorneys for Defendant

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

DAVID AVALOS, et al., Plaintiffs,	)	
v.	)	No. 86-0043-HLH
GENERAL SERVICES ADMINISTRATION	)	*DEFENDANT'S NOTICE OF STATUS*
Defendant.	)	

On March 9, 1988, this Court entered a judgment which set aside the decision of the General Service Administration (GSA) to revoke a permit issued to plaintiff David Avalos and remanded this action to GSA for further action. The Court noted in its Memorandum Decision that on remand, "GSA may consider whether placement at another location or modification of the display as shown are necessary conditions upon reinstating any permit, if such is warranted by the facts found to exist. GSA's hearing officer may not be convinced, after hearing presentations of the parties, that the fact that the fence was initially suggested as a possibility by GSA clerical

employee excuses the failure to later add the fence to the already filed application." Memorandum Decision of March 9, 1988, p. 21. The Court also noted that the determination of how the matter is to be resolved is "not within this Court's function." *Id.*

In accordance with the Court's remand order, James J. Kane, then Acting Director for GSA's Region 9, advised plaintiff, by letter dated May 20, 1988 (Exhibit A), that GSA was prepared to reconsider his permit application and requested that he inform GSA in writing within 15 days from receipt of the letter "of the dates and location you propose for the exhibit of your work of art." Plaintiff was further requested to "submit a complete description of the proposed exhibit."

Plaintiff did not comply with GSA's request. Instead, by letter dated May 27, 1988 (Exhibit B), plaintiffs' counsel stated that Mr. Avalos "will not enter into discussions or negotiations or any other kind of activity with G.S.A. concerning the 'San Diego Donkey Cart' until the litigation between himself and G.S.A., Paul Hamilton, Philip Waggoner, and the Hon. Gordon Thompson, Jr. has been finally concluded." Plaintiffs' counsel interpreted GSA's May 20 letter as proposing "piecemeal settlement discussions," and stated his belief that "Mr. Avalos is under no duty to comply with these conditions [set forth in GSA's letter of May 20, 1988] which G.S.A. has unilaterally imposed, and will not do so." *Id.*

Thereafter, on June 20, 1988, Robert S. Drakes, Acting Director, Real Property and Safety Division, Region 9, advised plaintiff that "[w]ithout the requisite information from Mr. Avalos as to the future intended display of his

artwork, it is impossible for GSA to schedule and arrange for the exhibit. GSA will need to know the dates your client desires, whether or not Mr. Avalos desires to utilize a fence, the location sought, etc." (Exhibit C). Plaintiff's counsel was also advised that GSA would take no further action until it received a specific application from Mr. Avalos. *Id.*

In response, plaintiffs' counsel stated that "[u]ntil such time as there is a judgment either deciding the real issues or holding that the court declines to decide them, Mr. Avalos will not proceed as though there is no pending and unresolved litigation." Letter of June 28, 1988 (Exhibit D). In plaintiffs' view, the issue is "what relief will be granted for the *violation* of Mr. Avalos' *right* to display the art work in January, 1986." (Emphasis in original). *Id.*

This action is plainly at an impasse, caused by plaintiff's refusal to participate in any further proceeding before GSA or to facilitate GSA's resolution of this matter. Plaintiff elected to go forward with his claims against GSA at the district court level, over defendant's objection.[1] Plaintiff secured a ruling on those claims which clearly envisions further proceedings before GSA. Yet plaintiff now claims that, in plaintiff's words, this "insignificant fragment" of his case (Exhibit D) should be stayed pending the Ninth Circuit's resolution of his

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[1] Defendant GSA requested a stay of the district court proceedings until plaintiff's appeal of the denial of his *Bivens* claims was resolved. Plaintiff refused to join in this motion and requested, instead, that his claims against GSA go forward before this Court.

appeal, and refuses to participate in any proceedings before GSA.

The most charitable interpretation of plaintiff's latest stance is that plaintiff is waiving the cure of a new permit and only seeks money damages. If that is plaintiff's choice, GSA will simply refrain from taking any further action on remand and plaintiff should be held to have elected against pursuit of approval of an application to display the artwork.

Alternatively, plaintiff may be balking at proceeding before GSA in a futile effort to keep his Ninth Circuit appeal alive. If the proceeding proposed by GSA goes forward and plaintiffs' permit application is given further consideration consistent with this Court's ruling, plaintiff clearly will have no basis for relief from the Ninth Circuit. As this Court recognized in its decision granting summary judgment for the individual defendants, a *Bivens* remedy is not available where there is an alternative mechanism provided by law for relief. *See* Memorandum In Re Motions for Summary Judgment, April 16, 1987, p. 24. Of course, the mere availability of an adequate remedy at law, namely the permit application process provided by GSA's regulations, demonstrates that plaintiff has no need for a damage remedy.

That there is litigation pending in the Ninth Circuit does not undermine or otherwise alter the effect of this Court's March 9 ruling. Plaintiff has appealed a discrete aspect of this case – the denial of his *Bivens* claims against two GSA employees and Judge Thompson. While defendants argued, in the interest of judicial economy and to preserve the integrity of defendants' qualified defense,

that proceedings before this Court should be stayed pending resolution of plaintiffs' appeal, their motion was denied and the claims against the agency defendants were decided. Plaintiff cannot simply ignore the Court's ruling in this regard and its specific directive remanding this case to the agency for further proceedings, based on plaintiff's belief that the "real issues" in this case have yet to be decided. Plaintiff's letter of June 28, 1988, to Robert S. Drakes (Exhibit D).

In sum, plaintiff has steadfastly refused to participate in any further proceeding before GSA, despite GSA's reasonable good faith efforts to bring this matter to a close. Supplying the information which GSA requests – the dates and place for displaying the artwork and a complete description of what plaintiff seeks to display – does not place an undue burden on plaintiff. However, plaintiff has apparently elected to not pursue this remedy and to rely instead on his claim for monetary relief. In the face of this election, defendants submit that they have fully satisfied this Court's order on remand and this Court should so rule.

Respectfully submitted,

JOHN R. BOLTON
Assistant Attorney-General

/s/ Brook Hedge
BROOK HEDGE

/s/ Theodore C. Hirt
THEODORE C. HIRT

/s/ Anne L. Weismann
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Attorneys for Defendant

EXHIBIT A

(SEAL) General Services Administration, Region 9 (SEAL)
525 Market Street
San Francisco, CA 94105-2799

May 20, 1988

CERTIFIED MAIL RETURN RECEIPT REQUESTED

Mr. David E. Avalos
708 "D" Avenue
National City, California 92050

Dear Mr. Avalos:

As you know, Judge Harry L. Hupp of the United States District Court for the Southern District of California issued an opinion and final judgment in the above-referenced case on March 9, 1988. In his order and judgment, Judge Hupp remanded this case to the General Services Administration for further action in accordance with the Judge's findings of fact and legal conclusions.

In accordance with Judge Hupp's decision, we are now prepared to reconsider your application for a permit to

display your work entitled "San Diego Donkey Cart" on the grounds of the United States Courthouse in San Diego, California.

In order to further our efforts, we request that you inform this office in writing within 15 days from receipt of this letter of the dates and location you propose for the exhibit of your work of art. We also request that you submit a complete description of the proposed exhibit.

We will review your request and verify the availability of space and dates with Paul Hamilton. If your proposal cannot be approved as submitted, you will be contacted and provided a full opportunity to respond to our concerns.

Sincerely,

/s/ James J. Kane
James J. Kane
Acting Director
Real Property and Safety Division

cc: Greg Marshall

EXHIBIT B

GREGORY MARSHALL
ATTORNEY AT LAW
432 F Street, Suite 205
San Diego, California 92101

(619) 544-9501

May 27, 1988

James J. Kane
Acting Director,
Real Property and Safety Div.
General Services Administration, Region 9
525 Market Street
San Francisco, CA 94105-2799

Dear Mr. Kane:

This letter will constitute the response of David Avalos to your letter dated May 20, 1988. As I have noted in separate correspondence addressed to the attorneys in *Avalos v. G.S.A.*, I request that all future communications between our clients be made directly through counsel.

With regard to the substance of your letter, please note at the outset that Judge Hupp's judgment imposed no duty on Mr. Avalos to submit anything to G.S.A., and imposed no deadlines upon him. Mr. Avalos is under no duty to comply with these conditions which G.S.A. has unilaterally imposed, and will not do so.

In this same connection, Mr. Avalos will not enter into discussions or negotiations or any other kind of activity with G.S.A. concerning the "San Diego Donkey Cart," until the litigation between himself and G.S.A., Paul Hamilton, Philip Waggoner, and the Hon. Gordon

Thompson, Jr., has been finally concluded. The primary reason for this is that Mr. Avalos always has sought, and still seeks, an order reinstating the permit for the placement of the art work where and as it was placed originally, for a period of time equivalent to the period originally prescribed, without further conditions of any kind other than conditions that prohibit persons or agencies from interfering with or canceling the permit. So long as the granting of that relief remains a prospect, Mr. Avalos has no reason to engage in the procedure proposed in your May 20 letter.

Nothing in this letter should be taken as indicating Mr. Avalos would not be willing to enter into discussions or negotiations aimed at settling the whole of the litigation. He and I are prepared to do so, and in that connection will entertain any settlement offer that is extended by either all defendant parties jointly, or each and all of the defendant parties separately but simultaneously. Our only limitation in this respect is that we will not engage in piecemeal settlement discussions, which is what the May 20 letter proposes, in essence.

Sincerely,

/s/ Gregory Marshall
Gregory Marshall

GM:lm

cc: David Avalos
Richard A. Olderman
Anne L. Weismann
Michael J. Weaver

EXHIBIT C

CERTIFIED RETURN RECEIPT REQUESTED

June 20, 1988

Gregory Marshall
Attorney at Law
432 "F" Street
Suite 205
San Diego, California 92101

Dear Mr. Marshall:

This letter responds to your May 27, 1988 correspondence to James J. Kane, Acting Director, Real Property and Safety Division, concerning Mr. Avalos' election not to display his "San Diego Donkey Cart" at this time.

The district court's decision remanding the matter to the General Services Administration (GSA) for further action consistent with the Court's findings envisioned further proceedings by the parties. When no request or information was forthcoming from your client, Mr. Kane wrote Mr. Avalos in an effort to proceed according to the Court's decision. We are troubled by the implication in your letter that GSA was proceeding improperly, and reject any such claims. In any event, we hope this letter clarifies your understanding of our position.

Without the requisite information from Mr. Avalos as to the future intended display of his artwork, it is impossible for GSA to schedule and arrange for the exhibit. GSA will need to know the dates your client desires, whether or not Mr. Avalos desires to utilize a fence, the location sought, etc.

In sum, the suggestion that "the permit" merely be reinstated does not take into account the Court's intervening decision and the unresolved issue of what application would be before GSA for consideration. If you are communicating to GSA that Mr. Avalos does not desire to display his exhibit at this time, that is his decision. Consistent with the district court's decision, GSA will process and decide any subsequent permit application Mr. Avalos intends to present for display of his artwork. Given our interpretation of his position as you have expressed it in your letter however – that no permit application is to be forthcoming – GSA will take no further action in this matter until it receives a specific application from your client.

Sincerely,

/s/ Robert S. Drakes
ROBERT S. DRAKES
Acting Director, Real Property
and Safety Division

9B30 – General Reading File
cc: 9 P.M.
drj DRJAYNE:9L:6/20/88:dkj

GREGORY MARSHALL
ATTORNEY AT LAW
432 F Street, Suite 205
San Diego, California 92101

(619) 544-9501

June 28, 1988

Robert S. Drakes, Acting Director
Real Property and Safety Division
General Services Administration, Region 9
525 Market Street
San Francisco, CA 94105-2799

Dear Mr. Drakes:

This letter responds to your letter of June 20. I am sending copies of it to all the attorneys in the case, so that they will not be in the dark.

Let me take things in chronological order. First, Mr. Avalos "elects" not to display his art work until he has achieved a satisfactory conclusion to the present litigation. The reason for this is that the issue here is not, as you would have it, whether Mr. Avalos *presently* desires to display the art work; the issue is what relief will be granted for the *violation* of Mr. Avalos' *right* to display the art work in January, 1986.

Next, I think the District Judge did envision further proceedings. But he did not order further proceedings and I would not be surprised if he anticipated, as I did, that further proceedings would not occur until the litigation is fully concluded.

Your own attorney, Anne Weismann, will recall a time when she and I were in agreement that it made no sense

to go forward with District Court proceedings in the insignificant fragment of this case that was not dismissed in 1986, before the appeal of the dismissal was resolved. I understand that GSA now perceives a tactical advantage in this, to wit, that it can proceed as though this fragment of the case encompassed all the issues, and the litigation is now at an end. In this manner Mr. Avalos can be denied a decision on the real issues. However, that gambit is declined. Until such time as there is a judgment either deciding the real issues or holding that the court declines to decide them, Mr. Avalos will not proceed as though there is no pending and unresolved litigation.

Indeed, you impliedly state your understanding of the facts underlying our position, in that portion of your letter about the court's intervening (and interlocutory) decision and the unresolved issues in the case.

In sum, it appears that we end up in similar positions. You wonder why Mr. Avalos does not proceed as you would like him to do, as though there were no pending litigation. We wonder why the defendants do not, as we have, await the decision of the Ninth Circuit Court of Appeals in the pending litigation, before thinking about taking any further steps. Let us see what the court decides.

Sincerely,

/s/ Gregory Marshall
Gregory Marshall
GM:lm

cc: Richard Olderman
Michael J. Weaver
Anne L. Weismann
David Avalos

FILED
MAY 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1469

In the Supreme Court of the United States

OCTOBER TERM, 1988

DAVID AVALOS AND SUSHI, INC., PETITIONERS

v.

GORDON THOMPSON, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
JOHN R. BOLTON
Assistant Attorney General
BARBARA L. HERWIG
RICHARD OLDERMAN
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Washington, D.C. 20530
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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals correctly dismissed petitioners' appeal in a constitutional tort action against General Services Administration (GSA) employees after petitioners failed to prosecute an action under the Administrative Procedure Act against the GSA that could have redressed their alleged injury.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1469

DAVID AVALOS AND SUSHI, INC., PETITIONERS

v.

GORDON THOMPSON, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS[1] IN OPPOSITION

OPINIONS BELOW

The following decisions are unreported: the August 12, 1988 order of the court of appeals dismissing the appeal without prejudice (Pet. App. A1); the April 16, 1987 decision of the district court on the immunity issue (Pet. App. A3-A29); the March 9, 1988 district court decision after trial on the APA issue (Thompson Br. in Opp. App. A3-A22); and the November 10, 1988 order of the district court dismissing the case for failure to prosecute (App., *infra*, 1a).

[1] This brief is filed on behalf of respondents Hamilton and Waggoner. Judge Thompson is represented by private counsel, who have filed a brief in opposition to certiorari on his behalf.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1988. A petition for rehearing was denied on December 7, 1988 (Pet. App. A2). The petition for a writ of certiorari was filed on March 6, 1989. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Public Buildings Cooperative Use Act of 1976, Pub. L. No. 94-541, 90 Stat. 2505, was enacted to encourage the occasional use of areas in and around public buildings for cultural, educational, and recreational activities. Regulations promulgated by the Administrator of the General Services Administration (GSA) require an individual wishing to use the area surrounding a public building to obtain a permit from the GSA building manager. 41 C.F.R. 101-20.702 (1981).[2] The permit application must contain a description of the activity or item proposed for display and the dates and hours during which the activity is to be carried out. *Ibid.* The building manager may deny or revoke a permit if, *inter alia*, the application is intentionally false or incomplete or the proposed use disrupts official business or hinders access to the public area. 41 C.F.R. 101-20.703. If a permit is denied or revoked, an applicant may seek informal review by the GSA regional officer. 41 C.F.R. 101-20.704.[3]

2. Petitioner Avalos, an artist, submitted an application for a permit to display an artwork, "San Diego Don-

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[2] C.F.R. citations are to the 1981 edition. See App., *infra*, 5a-9a. The regulations have been recodified, and are presently located at 41 C.F.R. 101-20.400 *et seq.*

[3] A permit applicant must be provided the opportunity to present oral and written materials to the GSA reviewing officer, who is required to render a decision within ten days of receiving notice of appeal. 41 C.F.R. 101-20.704(b) and (c).

key Cart," in the courtyard of the building housing the United States District Court for the Southern District of California. The GSA granted the permit for the period January 4, 1986, through January 17, 1986 (Pet. App. A5). In response to a GSA clerical employee's expression of concern about security, Avalos decided to add a chain and barbed wire fence around the artwork, but did not amend his permit to reflect that alteration (*ibid.*).

After installation of the artwork, a member of the security staff of the federal courthouse building advised Chief Judge Gordon Thompson, Jr. that the art work was a security problem because the surrounding fence prevented proper surveillance of the sculpture and its immediate area (Pet. App. A5-A6). After consultation with other judges of the district court, the Chief Judge wrote a memorandum to respondent Paul Hamilton, the GSA Field Office Manager in San Diego and the GSA manager of the courthouse building, directing him, "[f]or security reasons," to "cause the removal" of the work of art from the front of the federal courthouse (*id.* at A6). Hamilton advised the artist by telephone that Judge Thompson had directed the removal of the artwork. After Avalos took no action, GSA informed him by mail that his permit had been revoked under GSA regulations due to "considerations for the security of the building and its occupants" (*id.* at A7). When Avalos failed to remove the artwork, GSA personnel dismantled and stored it in an adjacent building (*id.* at A6-A7).

3. On January 10, 1986, Avalos took an administrative appeal from the decision to revoke his permit. In accordance with applicable GSA regulations, the administrative appeal was reviewed by the GSA regional of-

ficer, Phillip Waggoner. Waggoner contacted Avalos to inquire whether he wished to submit further materials, but Avalos declined (Pet. App. A8). On January 23, 1986, Waggoner denied the administrative appeal, ruling that the issue was moot because the period for displaying the work of art had expired, and that, in any event, the display violated 41 C.F.R. 101-20.702 because it differed significantly from the work described in the original permit application (Pet. App. A8).

On the day of his administrative appeal, Avalos and his art gallery (Sushi, Inc.) also filed a complaint in federal district court alleging that the removal of the artwork violated the First Amendment of the Constitution (Pet. App. A9). Relying on *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (1971), the complaint, as amended following denial of Avalos's administrative appeal, sought damages against Judge Thompson and GSA officials Hamilton and Waggoner in their individual capacity, as well as injunctive relief against these officials "apparently in their individual capacity" (Pet. App. A26). The complaint also sought review under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, of the GSA decision revoking the permit.

On April 16, the district court granted the motions for summary judgment filed by the individual defendants, holding that all three were shielded from *Bivens* liability by qualified immunity (Pet. App. A3-A29). Applying the objective standard for qualified immunity articulated by this Court in *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982), the court concluded that Judge Thompson, in ordering the artwork removed in response to a "perceived security problem" (Pet. App. A21), had acted pursuant to his legi-

timate authority over court security matters,[4] and had violated no "clearly established law" (*id.* at A19-A21).[5] With respect to Waggoner and Hamilton, the court explained that they were entitled to qualified immunity because they had acted "under the compulsion of an Article III judge's order * * * [and] there is no clearly established authority showing that they need not obey that order" (Pet. App. A25). The court also noted that both officials took action "in a legalistic manner under the [GSA] regulations," and concluded that the availability of APA review of the agency's decision as an alternative means for redressing petitioners' alleged injury barred *Bivens* relief (Pet. App. A25-A26). The court explained, in particular, that there was "no legitimate claim for an injunction against Hamilton and Waggoner individually" (Pet. App. A26) because "an injunction is among the remedies available against the agency for the agency action" that petitioners sought to remedy. With respect to the claim under the APA that the GSA had improperly revoked the artist's permit, the court found that there were disputed issues of fact and set the question for trial (Pet. App. A26-A29).

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[4] The court noted (Pet. App. A19-A20) that the Federal Protective Service (an agency of the GSA) and the United States Marshal (under the direction of the judges) had overlapping responsibility for courthouse security. It rejected petitioners' contention that the judges had no legitimate authority over security, citing Local Rule 122, adopted by the United States District Court for the Southern District of California, which provides:

> The court, or any judge may from time to time make such orders or impose such requirements as may be reasonably necessary to assure the security of the court and of all persons in attendance.

[5] The court also ruled that it had no authority to grant an injunction "to direct the Chief Judge of a federal district court as to the manner in which he must perform those duties" (Pet. App. A22).

4. Petitioners appealed the entry of judgment in favor of respondents on qualified immunity grounds.[6] While the appeal was pending, the district court ruled on the APA issue. The court determined that, to the extent the permit revocation rested on a theory of mootness, the revocation was arbitrary and capricious (Thompson Br. in Opp. App. A15). The court also ruled that while the second ground relied upon by the agency—the filing by Avalos of an incomplete application—"has a basis in the facts," (*ibid.*) and was "supported by substantial evidence" (*id.* at A17), the review was procedurally deficient because Avalos was not given an opportunity to explain in person his decision to alter his artwork by adding a fence. The court vacated the GSA decision and remanded the matter to the agency for further consideration, expressly setting forth constitutional principles to guide the agency on remand (*id.* at A18-A21).

The GSA thereafter notified Avalos that, in accordance with the district court judgment, "we are now prepared to reconsider your application for a permit to display your work" (Thompson Br. in Opp. App. A40-A41). The letter asked him to resubmit a complete description of the proposed exhibit and to suggest dates and a location for the display. *Ibid.* Avalos refused to comply with the request and stated in a May 27 letter to the GSA that he would "not enter into discussions or negotiations or any other kind of activity with G.S.A." (*id.* at A42-A43). On August 12, the court of appeals, which had stayed petitioners' immunity appeal pending the outcome of the remand proceedings ordered by the district court (App., *infra*, 3a), ordered the appeal dismissed without prejudice (Pet. App. A1). On November 11, 1988, the district court, in light of Avalos's unwillingness to participate in the proceedings on remand, entered a final judgment dismissing the action

[6] The district court certified the judgment as final and appealable under Fed. R. Civ. P. 54(b) (Pet. 5).

"for failure to prosecute" (App., *infra*, 1a).[7] Finally, on December 7, the court of appeals denied petitioners' rehearing petition (Pet. App. A2).[8]

ARGUMENT

On the basis of the district court's correct determination that the availability of administrative relief precluded a *Bivens* action, the court of appeals appropriately dismissed the appeal. In any event, petitioners cannot prevail in a *Bivens* action against respondents Waggoner and Hamilton because, as the district court held, those respondents were entitled to qualified immunity. Accordingly, further review by this Court is not warranted.

1. As the district court observed (Pet. App. A26), a *Bivens* action may not be appropriate where alternative legal action provides substantially equivalent relief. See *Bush* v. *Lucas*, 462 U.S. 367, 377 & n.13 (1983); *Schweiker* v. *Chilicky*, 108 S. Ct. 2460, 2468-2471 (1988). In this case, a *Bivens* action for damages is not "the only realistic avenue for vindication of constitutional guarantees." *Anderson* v. *Creighton*, 107 S. Ct. 3034, 3038 (1987), quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982). Resolution of the APA issue in petitioner Avalos's favor on remand would have completely rectified any First Amendment violation.[9]

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[7] The district court had earlier dismissed petitioner Sushi, Inc.'s action against the GSA for lack of standing (Thompson Br. in Opp. App. A23-A24).

[8] Pursuant to a request by the court of appeals on October 20, 1988 (App., *infra*, 4a), the parties continued to notify the court of the status of the GSA proceedings in late October and November (Thompson Br. in Opp. App. A25-A30).

[9] Such a resolution would have obviated a *Bivens* action not only by Avalos but also by petitioner Sushi, Inc.

Plainly, there was no need for the court to consider petitioners' request for an injunction against Waggoner and Hamilton for their role

The refusal to pursue procedures for the GSA's reconsideration of the permit revocation and to supply information that would have enabled the agency to comply with the district court's directives constituted a clear failure to prosecute, as the district court later held. Thus, the court of appeals was justified in dismissing petitioners' *Bivens* appeal.

2. Even if petitioners' *Bivens* cause of action was valid, the district court correctly determined that respondents Hamilton and Waggoner were entitled to qualified immunity. This Court has made clear that government officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. at 818; *Anderson* v. *Creighton*, 107 S.

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in the revocation of the permit, since an injunction was available in the APA action. Pet. App. A26. Indeed, the fact that the relief petitioners sought was available through APA review of the agency's action reveals that petitioners' real complaint was with agency procedures and the agency's revocation of the permit. For this reason, the appropriate avenue for relief was through appeal of the GSA's determination, not through a *Bivens* action against GSA officials in their individual capacity. See *Clemente* v. *United States*, 766 F.2d 1358, 1364-1365 & n.10 (9th Cir. 1985), cert. denied, 474 U.S. 1101 (1986).

Although damages are not available under the GSA regulations or the APA, petitioners sought damages "only as an alternative remedy" (Pet. App. A9). Moreover, petitioners allege no separate injury apart from the deprivation of the opportunity to display the artwork. Nor do they contend that their injury cannot be entirely redressed through reconsideration of the permit revocation. Compare *Carlson* v. *Green*, 446 U.S. 14, 18-20 (1979) (action for compensatory and punitive damages for Eighth Amendment violation of a prisoner's rights is not precluded by the availability of an action against the United States under the Federal Tort Claims Act).

Ct. 3034 (1987). In deciding whether an official is entitled to qualified immunity, a court must determine whether a reasonable official "in light of clearly established law and the [factual] information [he] possessed," could reasonably have believed that his behavior was lawful. 107 S. Ct. at 3040.

Under this test, the district court correctly held that Hamilton and Waggoner are entitled to qualified immunity. In light of the official perception of a security risk on public property, and the statutory and regulatory authority of the judges and the GSA to respond to that risk, these respondents' official actions surely did not violate First Amendment rights that were clearly established, if indeed such rights were violated at all. Cf. *Anderson* v. *Creighton,* 107 S. Ct. at 3039 ("in the light of preexisting law," the unlawfulness of the particularized official action "must be apparent"). Respondent Hamilton, the GSA manager of the federal courthouse building, simply followed Judge Thompson's order by informing Avalos that the Judge had ordered the artwork removed and by dismantling the display. Hamilton's decision to follow an order of the Chief Judge of the United States District Court – who was empowered by a local rule to "make such orders or impose such requirements as may be reasonably necessary to assure the security of the court and of all persons in attendance" (see note 4, *supra*) – can hardly be characterized as a violation of a clearly established right belonging to petitioners.

Petitioners' case against respondent Waggoner is also without merit. Waggoner, as the "regional officer" assigned to the San Diego area, was the person empowered by regulation to hear petitioners' administrative appeal. He did not violate any clearly established constitutional

right merely by carrying out a lawfully imposed and narrowly prescribed obligation to hear an appeal of an administrative decision.

In sum, the reasons advanced by the district court for rejecting petitioners' *Bivens* claim against respondents and for dismissing the APA action for failure to prosecute show beyond doubt that the appeals court was justified in dismissing the complaint.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1989

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 86-043-HLH

AVALOS

v.

GENERAL SERVICES ADMINISTRATION

Date 11/10/88

Present: HON. HARRY L. HUPP, Judge
ROBERT BOLTON, Deputy Clerk
Attorneys present for Plaintiffs:
Attorneys present for Defendants:

PROCEEDINGS:
Order following OSC re determination of final judgment

ORDER (also, if applicable, findings and memorandum opinion):

On March 9, 1988, the court entered an interlocutory judgment remanding the case to GSA for further administrative action following its determination that the administrative action which was the subject of this

proceeding must be set aside for further proceedings. Subsequent status reports from the parties lead the court to the conclusion that plaintiff has failed to prosecute further administrative proceedings and is satisfied to have the order setting aside the previous administrative action stand as final judgment in the action without seeking further administrative relief.

Accordingly, it is ordered that the interlocutory judgment setting aside the previous administrative action is now a final judgment (for purposes of Rule 54). The court further determines that the order for further administrative proceedings is no longer effective for failure to prosecute and that no further action is required by the judgment. Any requests for further relief under the judgment is dismissed. This order terminates this action.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA# 87-5939

DAVID AVALOS, ET AL., PLAINTIFFS/APPELLANTS

v.

GENERAL SERVICES ADMINISTRATION, ET AL.,
DEFENDANTS/APPELLEES

[Filed Mar. 10, 1988]

Before: FARRIS, NORRIS and REINHARDT, Circuit Judges

Oral argument is continued until Judge Hupp's proposed order has been entered and General Services Administration has responded to that order or for 60 days whichever first occurs. The panel will remain the same.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-5939

DAVID AVALOS AND SUSHI, INC., PLAINTIFFS-APPELLANTS

v.

GENERAL SERVICES ADMINISTRATION;
HON. GORDON THOMPSON, JR.; PAUL HAMILTON;
PHILIP WAGGONER, DEFENDANTS-APPELLEES

[Filed Oct. 20, 1988]

Before: FARRIS, NORRIS and REINHARDT, Circuit Judges

The parties are requested to advise the court, no later than November 2, 1988, of the status of any further General Services Administration remand proceedings since June 28, 1988.

41 C.F.R. (1981):

§ 101-20.701 Definitions.

* * * * *

(h) "Cultural activities" shall mean activities, including but not limited to films, dramatics, dances, and musical presentations, and fine art exhibits, whether or not these activities are intended to make a profit.

* * * * *

§ 101-20.702 Permits.

(a) *Application.* Any person or organization desiring to use a public area of a public building or its grounds shall first obtain a permit from the buildings manager. To obtain this permit, a copy, sample, or description of any material or item proposed for distribution or display and a written statement shall be submitted setting forth the following:

(1) The full name, mailing address, and telephone number of the applicant;

(2) The full name, mailing address, and telephone number of the person or organization sponsoring, promoting, or conducting the proposed activity;

(3) The full name, mailing address, and telephone number of the individual person or persons who will have supervision of and responsibility for the proposed activity;

(4) A description of the proposed activity;

(5) The proposed dates and hours during which the activity is to be carried out; and

(6) The approximate number of persons to be engaged in this activity, if known.

(b) *Applicants authority.* If the applicant claims to represent an organization, a letter or other documentation

is required showing that the applicant has authority to represent that organization.

(c) *Applications for permit to solicit contributions.* Any person or organization desiring to use a public area of a public building or its grounds for purposes of soliciting funds not prohibited by § 101-20.308 shall, in addition to the above requirements, submit a statement signed by the applicant that the:

(1) Applicant represents and will be soliciting funds for the sole benefit of a religion or religious group;

(2) Applicant's organizaton has received an official Internal Revenue Service (IRS) ruling or letter of determination stating that the organization or its parent organization qualifies for tax-exempt status under 26 U.S.C. 501 (c)(3), (c)(4), or (c)(5); or

(3) Applicant's organization has applied to the IRS for a determination of tax-exempt status under 26 U.S.C. 501 (c)(3), (c)(4), or (c)(5), and that the IRS has not yet issued a final administrative ruling or determination of this status.

(d) *Failure to complete application.* Failure to submit the information required by paragraphs (a), (b), and (c), of this section shall result in denial of a permit.

(e) *Filing.* Applications shall be filed during regular working hours in the buildings manager's office or such other place as he or she may designate. Applications may be submitted by mail or in person.

(f) *Permit issuance.* A single permit shall be issued within 10 days following receipt of the completed application by the buildings manager.

(1) Each permit shall authorize the permittee to conduct the activity for the period of time requested; provided that a permit shall not be issued for a period of time in excess of 30 calendar days, unless specifically approved by the regional officer. After the expiration of the permit, a

new permit may be issued to the former permit holder upon submission of a new application. In such a case, applicants may be permitted to incorporate by reference any required information or documentation filed with a previous application.

(2) If permits are requested for the same public area for the same time period, the building manager will issue permits on a first-come-first-served basis.

§ 101-20.703 Disapproval of application of cancellation of permit.

(a) *Grounds for disapproval or cancellation.* The buildings manager shall disapprove any application or cancel an issued permit for use of a public area if the proposed use:

(1) Is a commercial activity as defined in § 101-20.701(k);

(2) Obstructs the free ingress and egress of the users of the public area;

(3) Damages the public building or any property within the public building;

(4) Disrupts the official business of the agency or agencies occupying the public buildings;

(5) Interferes with a tenant's quiet enjoyment of their leasehold;

(6) Interferes with a previously approved use of the public area by another member, or members, of the public;

(7) Is obscene within the meaning of obscenity in 18 U.S.C. 1461-65;

(8) Pertains to any judicial proceeding then pending in the public building and this use is intended to influence or impede the judicial proceeding;

(9) Is in violation of the prohibition against political solicitations in 18 U.S.C. 603; or

(10) Is being conducted with a permit issued in response to an intentionally false or incomplete application.

(b) *Notice of disapproval of application or cancellation of permit.* Upon disapproving an application or canceling an issued permit for any of the above reasons, the buildings manager shall:

(1) Notify promptly the applicant or permittee in writing of disapproval or cancellation and the reasons for this action; and

(2) Inform the applicant of his or her right to appeal the disapproval or cancellation to the regional officer under § 101-20.704.

§ 101-20.704 Appeals from disapproval of application or cancellation of permit.

(a) *Time for appeal.* Within 5 calendar days of notification of the buildings manager's decision to disapprove any application or cancel an issued permit under § 101-20.703, the applicant or permittee may appeal the buildings manager's determination to the regional officer by notifying the regional officer, in writing, that he or she desires to appeal.

(b) *Record.* Although a trial-type hearing or presentation is not required, the applicant or permittee and the buildings manager shall have the opportunity to orally state the reasons that the application or cancellation should or should not be approved. Written materials and documents may also be submitted. The regional officer shall affirm or reverse the buildings manager's determination based on this information.

(c) *Time for review.* The regional officer shall affirm or reverse the buildings manager's determination within 10 days of the date on which the regional officer received the

applicant or permittee's notification of his or her desire to appeal. If the regional officer does not rule within this period, the application will be considered to be approved or the permit validly issued.

(d) *Notification.* Upon reaching a decision on an appeal taken under § 101-20.704, the regional office shall promptly notify the applicant or permittee and the buildings manager of the decision and the reasons therefore.

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